Office - Supreme Court, U.S.
FILED
JUN 25 1982
ALEXANDER L. STEVAS,
CLERK

81-2366

CASE NO.

SUPREME COURT OF THE UNITED STATES
October Term 1981

EFRAIN FIGUEREDO, et al,
Petitioners,

vs.

SOUTH FLORIDA BEVERAGE CORPORATION,
Respondent

CERTIORARI TO THE DISTRICT COURT
OF APPEAL OF FLORIDA
THIRD DISTRICT

PETITION FOR CERTIORARI

RICHARD KANNER
Attorney for Petitioners
777 Brickell Avenue
Miami, Florida 33131

SUPREME COURT OF THE UNITED STATES

PETITION FOR CERTIORARI

EFRAIN FIGUEREDO, et al,
Petitioners,

vs.

SOUTH FLORIDA BEVERAGE CORPORATION,
Respondent

I.

QUESTIONS PRESENTED

1. In a private class action[1] to enforce the overtime pay provisions of the Fair Labor Standards Act, what right does the state appellate court have to reverse the trial court's substantiated finding of fact that petitioners' normal non-overtime work period was eight hours?

2. In the absence of an explicit agreement, is a weekly pay calculated on the theory that permanently employed delivery truck drivers are paid a daily wage to cover all hours of employment appropriate where the daily schedule is controlled by the employer?

II.

INDEX TO PETITION AND CASES

1. Questions Presented 1
2. Courts Jurisdiction 2
3. Statement of the Case 2
4. Argument 7

American Railway Express Co. v. Levee, 263 U.S. 19
Brennan v. Elmer's Disposal Service Inc., 510 F. 2d 84 (9 Cir. 1975)
Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697

---

1. The sixty-three individual plaintiffs are listed in Appendix, p. 50.

Harris v. Penn. R.R., 361 U.S. 15
Norris v. Alabama, 294 U.S. 587
Perma Life Mufflers v. International Parts, 392 U.S. 134
Shaw v. Shaw, 334 So.2d 13 (Fla. 1976)
Skidmore v. Swift & Co., 323 U.S. 134
Westerman v. Shell's City Inc., 265 So.2d 43 (Fla. 1972)
Wilkerson v. McCarthy, 336 U.S. 53

III.

JURISDICTION

The Florida Third District Court of Appeal decision, dated December 22, 1981 (App. 12) is reported at 409 So. 2d 490. Certiorari was denied by the Florida Supreme Court in an as yet unreported per curiam decision, one judge dissenting, dated May 28, 1982 (App. 27).

Jurisdiction is conferred on this court by 28 U.S. Code 1257 and the rule of *American Railway Express Co. v. Levee*, 263 U.S. 19 that the time for filing here is computed from the date the Florida Supreme Court refuses to accept its discretionary jurisdiction.

IV.

PERTINENT STATUTE

This case concerns the application of the term "regular rate" mentioned in Section 7 of the Fair Labor Standards Act, 29 U.S.C. §207 (App. 49) to the trial court's finding of fact.

V.

STATEMENT OF THE CASE

Plaintiffs were employed as delivery truck drivers for a Pepsi-Cola distributor. Each morning plaintiffs were given specific assignments where to make their deliveries (App. 43). The standard instruction was that the assigned deliveries must be completed prior to their returning to the bottling plant (App. 43). Plaintiffs did no selling.

Plaintiffs were hired pursuant to the terms of two consecutive union collective bargaining agreements. Each provided a

weekly base pay and "the regular work week shall be Forty Hours consisting of 5 consecutive eight-hour days beginning Monday and ending on Friday."[2] The first contract further provided that overtime shall be based on the fluctuating weekly salary provided for in the Wage and Hour Interpretative Bulletin, 29 C.F.R. §778.114. Overtime under the second contract was to be paid at straight time. The actual practice, however, was to pay wages weekly, not in accordance with the contracts, but based on the assumption that plaintiffs earned a daily wage of one-fifth their stated weekly base wage to cover all hours necessary to complete the job (App. 38, 24).

Pepsi never advised plaintiffs that the forty-hour provision found in both contracts was changed in the calculation of their pay to a daily wage to cover all hours (App. 39, 40, 44).

Plaintiffs who worked five days invariably worked longer than forty hours (App. 44, 45, 47). Overtime was paid under the first contract at half time called "Chinese overtime" because the longer a plaintiff worked the less his regular rate was computed to be. Overtime under the second agreement was straight time. Overtime was paid even when plaintiffs worked less than five days and hence less than forty hours, when plaintiffs' total hours exceeded eight times the number of days worked, even though Pepsi knew such "overtime" payments were not required by the F.L.S.A. (App. 38, 39).[2a]

Immediately after plaintiffs complained to the Wage Hour Board, Pepsi began paying time and a half wages after forty hours (App. 44) and plaintiffs filed a class action (App. 28) to recover three years of underpaid overtime wages due them under the Fair Labor Standards Act.

---

2. This clause of the agreement is included in the district court opinion and, together with the hourly pay provisions relating to longevity pay increases and reporting and call in pay, are at Appendix, p. 34.

2a. An employee who worked 38 hours in four days would be paid six hours overtime at half time under the initial contract and at straight time under the second contract.

In a non-jury trial the judge entered an order on final hearing (App. 24) that plaintiffs were entitled to time and a half for overtime, finding inter alia:

2. The plaintiffs were hired in accordance with the terms of written employment agreements, entered July of 1975 and again in July of 1978, each of which provides that the regular work week is forty hours, consisting of five consecutive eight-hour days and for weekly pay. The "regular rate" for each plaintiff is his weekly pay specified in the employment agreement divided by 40.

3. The defendant's calculation of wages for work in excess of forty hours between June 8, 1976 and March 2, 1979 was based on the assumption that daily wages equal to one-fifth of the weekly wage stated in the contract was to cover all of the hours which plaintiffs were required to work during the day.

* * *

6. The normal non-overtime work period established by the defendant for these plaintiffs was eight hours in a day and forty hours in a week.

7. The "regular rate" for each plaintiff is his weekly pay specified in the employment agreements divided by 40.

These findings were based on the following evidence:

1. Pepsi's expert witness testified the plaintiffs were paid on a daily basis *and daily overtime* even when employed less than forty hours (App. 38).

The Witness:

A. These employees were paid on a daily basis with overtime, daily overtime on multiples of eight, and weekly overtime over forty hours.

The Court: Were they paid overtime also—I see, even when it was less than forty hours. Overtime was being paid; is that right—on multiples of eight hours a day?

The Witness: Yes Sir.

The Court: And there is no statutory obligation to do that, is that what you are saying?

The Witness: No sir, not under the Fair Labor Standards Act.

The Court: Pepsi just did it as a generous gesture?

The Witness: It is an inference that I can't support with anything in the record. I don't know whether there were instructions to that effect or whether it was just because of the computer programming. I just don't know.

2. Pepsi's comptroller who admitted defendant computed and paid "overtime" each day after eight hours though plaintiffs may have worked less than forty hours in the week (App. 39).

3. Pepsi's personnel manager testified that the normal non-overtime work week was determined by the union agreement (eight hours) and that plaintiffs were not hired on a daily basis. (App. 42).

4. Pepsi's failure to offer in evidence any written company wage policy instructions, statements or memoranda that Pepsi intended to pay wages based on a daily wage for all hours worked (App. 38, 41).

5. Plaintiffs' testimony that they were hired to work under the terms of the union agreement (App. 43) and not advised of any changes (App. 44).

6. The plaintiffs' expert witness, the admissibility of whose testimony was not challenged on appeal, that defendant actually computed wages on an hourly rate and did not pay a daily wage (App. 45).

7. The written collective bargaining agreements.

The district court of appeal ignored all the testimony and limited its discussion solely to one aspect of the written collective bargaining agreements.

The trial judge's ruling was, and on this record could have been based only upon the single isolated sentence in the

> collective bargaining agreement "the regular work week shall be FORTY HOURS consisting of five consecutive eight-hour days beginning on Monday and ending on Friday."

and ordered the complaint to be dismissed because half time for overtime was appropriated when applied to the fluctuating work day.

> The situation involved here is precisely treated in 29 C.F.R. §778.112 (day rates and job rates) * * * This result is exactly the same as the one applied in 29 C.F.R §778.114 to the analytically identical but more common situation of a guaranteed or fixed *weekly* allowance for fluctuating hours (emphasis in original).

The district court further found that plaintiffs had ratified the actual pay practice.

> The proper resolution of any inconsistencies which may arguendo exist in this agreement, like any other, is best determined by the manner in which the parties actually performed under it. *Brooklyn Life Ins. Co. of New York v. Dutcher*, 95 U.S. 269, 24 L.Ed. 410 (1877); *Lalow v. Codomo*, 101 So.2d 390, 393 (Fla. 1958); *4 Williston, supra* Sec. 623. As to this important factor, there is no doubt that everyone, without issue, dispute or complaint, treated the agreement as one which called for the overtime specifically agreed to, not the one required by the ex post facto application of the "forty hour work week" clause.

Plaintiffs sought certiorari in the Florida Supreme Court on the grounds that the district court improperly reweighed the evidence in violation of settled Florida law[3] and as such was an express conflict of decisions giving the supreme court jurisdiction.[4] The supreme court denied certiorari without opinion, one judge dissenting (App. 27).

---

3. *Shaw v. Shaw*, 334 So.2d 13 (Fla. 1976) and *Westerman v. Shell's City Inc.*, 265 So.2d 43 (Fla. 1972).

4. Florida Constitution, 1980 Amendment, Art. 4§3.

VI.

ARGUMENT

This Court has historically granted certiorari when the question involves application of United States laws to the facts in question,[5] and state appellate courts have rejected trial courts' findings of fact[6] or failed as here to consider the evidence,[7] especially when private enforcement may be necessary to effectuate the public purpose.[8]

The interpretative bulletin §778.108 is clear that the "regular rate" is "the hourly rate actually paid the employee for the normal, non-overtime work week." The trial judge found that the normal non-overtime period was eight hours because Pepsi had no written company wage policy instructions, statements or memoranda showing that Pepsi intended from the start to pay wages based on a daily wage for all hours worked, and the daily wage claim was totally refuted by Pepsi's payment of daily overtime when plaintiffs worked less than forty hours. The district court never discussed these facts or the other testimony relied upon by the trial court.

The district court's citation to 29 C.F.R. 778.114 in support of its opinion is unconscionable because 778.114 specifically requires that the fluctuating wage formula is not applicable "unless the employee clearly understands that the salary covers whatever hours the job may demand." The closest case factually on point and argued in the district court is *Brennan v. Elmer's Disposal Service Inc.*, 510 F. 2d 84, 88 (9 Cir. 1975) which discussed this requirement and the concept of waiver relied upon by the district court. The court noted:

---

5. See *Norris v. Alabama* 294 U.S. 587.

6. See *Wilkerson v. McCarthy* 336 U.S. 53 and *Harris v. Penn. R.R.* 361 U.S. 15 regarding Federal Employers Liability Act.

7. *Brooklyn Sav. Bank v. O'Neil* 324 U.S. 697 concerning the FLSA.

8. See *Perma Life Mufflers v. International Parts* 392 U.S. 134 regarding anti-trust actions.

> Appellant would have this court infer from certain elements of its wage plan and wage practices that an agreement was reached between itself and its employees concerning the designated rate. * * * Appellant has failed to present any evidence of negotiation or agreement concerning the regular rate of compensation it paid to its employees. That the employees did not complain of the plan is not sufficient to support a finding that the designated rate was the "regular rate" described by the statute or that the employees agreed to the designation made by appellant. Although the employees may have been aware of the rate designation because it showed on the paycheck stubs, the cases and the statute require an explicit agreement and none was proven in this case. * * *
>
> Finally, while not a necessary element of the Secretary's case, the fact that appellant docked absent employees a flat one-sixth of the fixed weekly wage for each day missed without reference to hours worked tends to strengthen the conclusion that this wage plan violates the Adt's overtime provisions. *149 Madison Avenue Corp. v. Asselta,* 331 U.S. 199. For example, an employee would lose as much for the second day's absence as for the first, although the first might result in a reduction in the overtime hours and the second might not.

See also *Skidmore v. Swift & Co.,* 323 U.S 134 discussing the respect which courts should give administrative interpretations.

Nor has any case heretofore held that the fluctuating daily or weekly wage concept is appropriate when the work schedule is controlled by the employer. See the analogous provision of 29 C.F.R. 778.405 that the fluctuating principle is not applicable when the employer can control or anticipate the number of hours of employment or when the duties do not necessitate significant variations in weekly hours.

The trial judge was not a fool. He realized that Pepsi saved hundreds of thousands of dollars[9] by blatantly substituting the

---

9. See Exhibit 13, App. 47 showing underpayment of $442.64 for one representative plaintiff during seven representative weeks.

agreements' forty-hour provision with an unlimited hour concept without an explicit agreement, and in circumstances where a fluctuating day concept was not factually appropriate. Pepsi's flaunting of the contract and manipulation of the interpretative rules, with or without tacit union support, are the precise practices the FLSA was designed to prevent.

Private resort to the state courts in the Southern District of Florida to recover back wages required by the FLSA will be necessary as long as the Federal docket here is congested with drug cases,[10] and in the circumstances here, the Wage and Hour division need not be concerned with future enforcement of the Act because Pepsi was in compliance after the administrative complaint.

Theoretically, state courts should be as competent to judge federal rights as are the federal courts. As a practical matter, however, this case illustrates that at least this state court, as shown by its citations to federal rules and cases out of context and reliance on state contractual law, lacks the experience to appreciate the national purpose of the Fair Labor Standards Act. The reason for its hostility is not apparent, but the only way to insure that this tampering does not happen again in a state court is for this Court to strongly tell the state judicial systems that they can only earn this Court's respect by their faithful adherence to federally guaranteed rights.

Respectfuily submitted,

RICHARD KANNER
Attorney for Petitioners
777 Brickell Avenue
Miami, Florida 33131
(305) 374-2280

---

10. Justice Berger's administrative order of March 23, 1982, assigning four visiting judges here, and the April 1982 report issued by the Administrative Office of the United States Courts acknowledge this problem.

INDEX TO APPENDIX

Opinion, Third District Court of Appeal 12
Trial Court Order on Final Hearing 24
Per Curiam Opinion of Florida Supreme Court 27
Complaint 28
Answer 30
Pertinent Parts of Collective Bargaining Agreements 34
Pepsi's Expert Witness Testimony 38
Pepsi's Comptroller Testimony 39
Pepsi's Personnel Manager Testimony 42
Plaintiffs' Testimony 43
Plaintiffs' Expert Witness and Exhibit 45
Section 7, Fair Labor Standards Act 49
Names of Individual Plaintiffs 50

Case No. 80-2172

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT
JULY TERM, A.D. 1981

SOUTH FLORIDA BEVERAGE CORPORATION,
Appellant,

vs.

EFRAIN FIGUEREDO, et al.,
Appellees.

Opinion filed December 22, 1981.

An Appeal from a non-final order from the Circuit Court for Dade County, Herbert M. Klein, Judge.

Hogg, Allen, Ryce, Norton & Blue and W. Reynolds Allen and Lewis E. Shelley, for appellant.

Kanner, Brown & Lambert and Richard Kanner, for appellees.

Before BARKDULL, SCHWARTZ and NESBITT, JJ.

SWARTZ, Judge.

The South Florida Beverage Corporation appeals from a non-final order, rendered after a bench trial, which held it liable to the plaintiffs, 63 of its present and former employees, for failure to make overtime compensation payments allegedly required by the Fair Labor Standards Act, 29 U.S.C. §201, *et seq.*[1] Because we find that the appellant was, as a matter of law, in full compliance with the terms of the statute, we reverse the order under review and direct the dismissal of the complaint.

South Florida does business as the Pepsi-Cola Bottlers of Miami; the plaintiffs worked for the company as route drivers between June 8, 1976 and March 2, 1979. This dispute concerns

---

1. Since the order, which referred the calculation of damages to a master, determined the issue of liability in favor of parties seeking affirmative relief, we have jurisdiction under Fla.R.App.P. 9.130(a)(3)(C)(iv).

the determination of the employee-plaintiffs' "regular rate" of pay during that period under the requirement of §207(a)(1) of the FLSA that

> no employer shall employ any of his employees...for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.[2]

More specifically, the issue is whether the regular rate is correctly computed by dividing each employee's stipulated weekly salary by forty—so that, for example, the "regular rate" of a driver employed for $240.00 per week who worked forty-eight hours would be $6.00, requiring an additional $9.00 to be paid for each of the eight hours above forty, or $72.00; or by dividing the salary by the hours actually worked during the week. In the hypothetical situation this would yield a "regular rate" of $5.00 and require an additional payment of half of that for each extra hour over forty hours, or a total of $20.00. The latter method was the one actually employed by Pepsi, and accepted by the drivers and their union without complaint for virtually[3] the whole period in question. Based, however, almost entirely upon a single clause in their collective bargaining agreement,[4] the plaintiffs argued and the

---

2. The appellant challenges the trial court's finding that it was subject to the FLSA. The basis of our decision permits us to assume without directly deciding the correctness of this conclusion. See, 29 U.S.C. §203(s); *Roland Electric Co. v. Walling*, 326 U.S. 657, 66 S.Ct. 413, 90 L.Ed. 383 (1946); *D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 66 S.Ct. 925, 90 L.Ed. 1114 (1946); *Wirtz v. Standard Container and Paper Co.*, 389 F.2d 134 (5th Cir. 1967); *Wirtz v. Soft Drinks of Shreveport, Inc.*, 336 F.Supp. 950 (W.D.La. 1971).

3. See note 6, *infra*.

4. The relevant provisions of the agreement between the appellant and the United Steelworkers local which represented the appellees are as follows:

ARTICLE VI
HOURS OF WORK AND OVERTIME

Section 1.

The regular work week shall be FORTY (40) HOURS consisting of five consecutive eight hour days beginning on Monday and ending on

trial judge ruled that the former, or the fixed rate-fixed hours method, was required by the FLSA. Because the employees were, in fact, paid on a flat-sum-per-day-regardless-of-hours-worked basis which rendered the method of computation of overtime adopted by the parties the appropriate one under the applicable law, we hold that this conclusion was wrong.

The polestar in the determination of the "regular rate" question is the reality of the particular situation, that is, what hours and methods of pay were adopted "in actual fact" by the employer and employee. In an early and often-repeated interpretation of this provision of the FLSA, the Supreme Court so held in *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 65 S.Ct. 1242, 89 L.Ed. 1705, 1710 (1945):

> The regular rate by its very nature must reflect all payments which the parties have agreed shall be received regularly during the workweek, exclusive of overtime payments. It is not an arbitrary label chosen by the parties; it is an actual fact. Once the parties have decided upon the amount of wages and the mode of payment the determination of the regular rate becomes a matter of mathematical computation, the result of which is unaffected by any designation of a contrary 'regular rate' in the wage contracts.

Accord, e.g., *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 461, 68 S.Ct. 1186, 92 L.Ed. 1502 (1948); *149 Madison Avenue*

Friday. The regular starting time for employees covered hereunder shall be between 6:00 a.m. and 7:00 a.m. (with the exception of special events employees, whose regular starting time shall be 7:30 a.m.).

* * *

Section 3.

Overtime shall be payable as follows:

Salaried pre-sell drivers shall receive, for all hours worked in excess of forty (40) in a given workweek, overtime pay in accordance with the procedure outlined in Interpretive Bulletin Section 778.114 of the Wage and Hour Administrator, entitled "Fixed Salary for Fluctuating Hours."

All other employees covered hereunder will be compensated as provided elsewhere in this Agreement.

The emphasized clause is the one relied upon by the appellees and the lower court.

Corp. v. Asselta, 331 U.S. 199, 67 S.Ct. 1178, 91 L.Ed. 1432 (1947). In this case, the "actual facts" of the wage-and-hour circumstances of the Pepsi-Cola drivers appear with crystal clarity. Because of the wide disparities in, among other things, their daily duties and the lengths of their routes, the time required of these employees varied considerably from person to person, week to week, and day to day. The parties adopted a *modus operandi* to reflect and compensate for these fluctuations. Under it, a driver received a guaranteed payment of one-fifth of his designated weekly salary for each weekday he reported for work no matter how many hours he worked on that particular day. If he worked for more than forty hours during the five day workweek,[5] the overtime required by the FLSA was determined, as has been indicated, by dividing the designated weekly salary by the hours worked during that week and adding fifty percent of the result for each of the hours over forty.[6] The following two actual examples illustrate the process:

---

5. Soon after the beginning of the pertinent period, the union and Pepsi also agreed to pay a driver one-fifth of his weekly salary for each Saturday he reported. The number of hours worked on Saturday was, by agreement, not tallied or computed in determining the total workweek for overtime purposes, apparently because it was thought that the full day's allowance for these hours was more than sufficient to compensate for any time-and-a-half over 40 hours the Saturday time would have required. Although they so argued below, the appellees did not carry their required burden to *show*, whether by their own testimony, cf. *Mitchell v. Mitchell Truck Line, Inc.*, 286 F.2d 721 (5th Cir. 1961) or otherwise, that this was not the case and that they were therefore entitled to any additional compensation for Saturday work. *Hodgson v. A.W. Crossley, Inc.*, 365 F. Supp. 1131 (S.D.N.Y. 1973). See also, 29 U.S.C. §207(e)(6)(premium Saturday pay not included in "regular rate.")

---

6. In 1978, the union and the employer agreed to pay "straight time," or 1/40 of the agreed weekly wage, for every hour over 40 worked during weekdays. In the $240.00 per week-48 hours example in the text, this resulted in the payment of $40.00 additional for overtime. While this was less than the amount the appellees argued was required under the 40-hour, fixed hours-fixed salary method the trial court found was appropriate, it was more than we find *infra* was required by the FLSA under the "actual facts."

1. Plaintiff "A"—contractual salary of $220.00 per week.

	Hours worked	
Monday	8.22	
Wednesday	7.12	
Thursday	6.00	
Friday	6.44	
Actual hours	27.78	
Actual pay:	4 days	
	× $44.00	per day (1/5
	$176.00	of $220.00)

2. Plaintiff "B"—contractual salary of $244.00 per week.

	Hours worked	
Monday	8.95	
Tuesday	8.20	
Wednesday	9.42	
Thursday	7.88	
Friday	8.76	
Actual hours	43.21	
Actual pay:	5 days	
	× $48.80	(1/5 of $244.00)
	$244.00	
Plus:	$244.00	÷ 43.21 = $5.65 per hour
	$ 5.65	× ½ × 3.21 over-
	$ 9.05	time hours
Total:	$253.05	

It is abundantly clear that this method of computing and paying overtime was in full accord with the requirements of §207(a), as authoritatively implemented by the relevant regulations of the Wage and Hour Division, Employment Standards Administration of the U.S. Labor Department and applied in the

controlling decisions. The situation involved here is precisely treated in 29 C.F.R. §778.112:

> If the employee is paid a flat sum for a day's work or for doing a particular job, without regard to the number of hours worked in the day or at the job, and if he receives no other form of compensation for services, *his regular rate is determined by totaling all the sums received at such day rates or job rates in the workweek and dividing by the total hours actually worked. He is then entitled to extra half-time pay at this rate for all hours worked in excess of 40 in the workweek.* [e.s.]

This result is exactly the same as the one applied in 29 C.F.R. §778.114 to the analytically identical but more common situation of a guaranteed or fixed *weekly* allowance for fluctuating hours:

> Section 778.114 Fixed salary for fluctuating hours.
>
> (a) *An employee employed on a salary basis may have hours of work which fluctuate from week to week and the salary may be paid him pursuant to an understanding with his employer that he will receive such fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, whether few or many.* Where there is a clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than for working 40 hours or some other fixed weekly work period, such a salary arrangement is permitted by the Act if the amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours he works is greatest, *and if he receives extra compensation, in additon to such salary, for all overtime hours worked at a rate not less than one-half his regular rate of pay. Since the salary in such a situation is intended to compensate the employee at straight time rates for whatever hours are worked in the workweek, the regular*

rate of the employee will vary from week to week and is determined by dividing the number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week. Payment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay requirement because such hours have already been compensated at the straight time regular rate, under the salary arrangement. [e.s.][7]

The cases establish that these regulations reflect and embody the appropriate judicial resolution of controversies such as this. A large number which so hold are collected in *Yadav v. Coleman Oldsmobile, Inc.*, 538 F.2d 1206, 1207-08 (5th Cir. 1976):

> The magistrate arrived at his total due figure by applying the so-called 'fluctuating work week' formula. See 29 C.F.R. §778.114 (1975). This was correct and we affirm.
>
> An employee under 29 C.F.R. §778.114 who is 'employed on a salary basis may have hours of work which fluctuate from week to week and the salary may be paid pursuant to an understanding with his employer that he will receive such fixed amount as straight time pay for whatever hours he is

---

7. The illustrations contained in subsection (b) are exactly equivalent to what occurred at Pepsi-Cola during the pertinent time:

> The application of the principles above stated may be illustrated by the case of an employee whose hours of work do not customarily follow a regular schedule but vary from week to week, whose overtime work is never in excess of 50 hours in a workweek, and whose salary of $80 a week is paid with the understanding that it constitutes his compensation, except for overtime premiums, for whatever hours are worked in the workweek. If during the course of 4 weeks this employee works 40, 44, 50, and 48 hours, his regular hourly rate of pay in each of these weeks is approximately $2, $1.82, $1.60, and $1.67, respectively. Since the employee has already received straight-time compensation on a salary basis for all hours worked, only additional half-time pay is due. For the first week the employee is entitled to be paid $80; for the second week $83.64 ($80 plus 4 hours at 91 cents, or 40 hours at $1.82 plus 4 hours at $2.73); for the third week $88 ($80 plus 10 hours at 80 cents, or 40 hours at $1.60 plus 10 hours at $2.40; for the fourth week approximately $86.72 ($80 plus 8 hours at 84 cents or 40 hours at $1.67 plus 8 hours at $2.51).

called upon to work in a work week, whether few or many.' It is clear from the record in this case that Ms. Yadav understood that she was to receive a straight salary of $1,000.00 per month for whatever hours she worked. Therefore, her regular rate of pay is determined by dividing the total wage by the total hours *actually worked* in each particular week. *Overnight Motor Transportation Co. v. Missel*, 316 U.S. 572, 579-581, 62 S.Ct. 1216, 86 L.Ed. 1682 (1942); *Brennan v. Lauderdale Yacht Basin, Inc.*, 493 F.2d 188, 191 (5th Cir. 1974); *Nunn's Battery & Electric Co. v. Goldberg*, 298 F.2d 516, 519 (5th Cir. 1962); *Warren-Bradshaw Drilling Co. v. Hall*, 124 F.2d 42, 44 (5th Cir. 1941), aff'd 317 U.S. 88, 63 S.Ct. 125, 87 L.Ed. 83 (1942). See also *Mumbower v. Callicott*, 526 F.2d 1183, 1187 (8th Cir. 1975); *Brennan v. Valley Towing Co., Inc.*, 515 F.2d 100, 104-111 (9th Cir. 1975); *Triple 'AAA' Co. v. Wirtz*, 378 F.2d 884, 887 (10th Cir.), cert. denied, 389 US. 959, 88 S.Ct. 338, 19 L.Ed.2d 364 (1967); *St. John v. Brown*, 38 F.Supp. 385, 389-390 (N.D. Tex. 1941); 29 C.F.R. §§778.109, 778.325-326 (1975); *cf. Wirtz v. Leon's Auto Parts Co.*, 406 F.2d 1250 (5th Cir. 1969); *Flores Hernandez v. Infanteria Thom McAn, Inc.*, 516 F.2d 1293, 1296 (1st Cir. 1975).

An application of the doctrine expressed in these authorities requires reversal here.

As has been indicated, the trial judge's ruling was, and on this record could have been based only upon the single isolated sentence in the collective bargaining agreement that "[t]he regular work week shall be FORTY (40) HOURS consisting of five consecutive eight hour days beginning on Monday and ending on Friday."[8] For several reasons, however, this provision does not serve to support the decision under review.

1. First, and most significant, even an express statement in a collective bargaining agreement or other employment contract may not, as we have seen, be permitted to control the entitlement to benefits under the "regular rate" provision of the FLSA. That

---

8. See note 4, *supra*.

is a separate,[9] purely statutory question which is determined by what the parties do, not by what they say. See generally, *Barrentine v. Arkansas-Best Freight System, Inc.*, 101 S.Ct. 1437, 67 L.Ed.2d 641 (1981). In *Bay Ridge Operating Co. v. Aaron, supra,* the Court stated, in no uncertain terms:

> A vigorous argument is presented for petitioners by the International Longshoremens Association that a collectively obtained and administered agreement should be effective in determining the regular rate of pay but we think the words of and practices under the contract are the determinative factors infinding the regular rate for each individual.
>
> As the regular rate of pay cannot be left to a declaration by the parties as to what is to be treated as the regular rate for an employee, it must be drawn from what happens under the employment contract.[10]

334 U.S. at 463-64, 68 S.Ct. at 1196, 92 L.Ed. at 1516-17. Since "what happened" under this agreement conclusively shows the propriety of the employer's overtime payments, any contrary language in the agreement is essentially irrelevant.

2. Even acknowledging that the contract is to be given some weight in determining the "actual facts" of the regular rate, see *Barrentine v. Arkansas-Best Freight System, Inc., supra; Bay Ridge Operating Co. v. Aaron, supra,* the language upon which the plaintiffs rely is insufficient to support the result reached below. This is shown by an application of the most elementary principles of contract construction.

---

9. The plaintiffs themselves have *sub silentio* recognized the distinctiveness of the issues. Although many of them are the union leaders who were active in negotiating the contract, they do not claim in this action — and in fact have never contended, by invoking its arbitration provisions or otherwise — that the appellant has not paid the wages required by the terms of the collective bargaining agreement itself.

---

10. It is true that the "actual facts" test was applied in *Aaron*, as in most, if not all, other instances to *increase* the return to employees above the amount due under what was designated as the "regular rate" in the contract. We are unwilling to believe, however, that the doctrine is not a neutral principle which must be applied even though, as here, it may have the opposite effect.

(a) It is apodictic that, in determining the intention of the parties, individual terms of a contract are not to be considered in isolation, but as a whole and in relation to one another, with specific language controlling the general. *Hollerbach v. U.S.*, 233 U.S. 165, 34 S.Ct. 553, 58 L.Ed. 898 (1914); *Bystra v. Federal Land Bank of Columbia*, 82 Fla. 472, 90 So. 478 (1921); *4 Williston on Contracts* §618 (3rd ed. 1961). Viewed in this light, the forty-hour provision simply does not mean—or even say—what the court held it did. Indeed, it does not even speak to the real issue in the case—the "regular *rate*" of the drivers. Instead, it provides only that the "regular *work week*" is forty hours, and may thus properly be viewed as merely declaratory of and meaninglessly redundant to what the FLSA already provides insofar as overtime pay is concerned.[11] More important, two paragraphs later,[12] the parties directly addressed the "regular rate"-overtime question. Compare *Mumbower v. Callicott*, 526 F.2d 1183, 1188 (8th Cir. 1975). They did so by providing, first, that it was to be governed by the "procedure outlined in . . . Section 778.114"—the fluctuating hours standard which has already been quoted—and subsequently, see note 6, *supra*, by the payment of "straight time" for overtime hours. Both methods are totally inconsistent with the position adopted below, that the parties agreed to pay the designated salary for a fixed forty-hour workweek, so that the "regular rate" was simply the salary divided by forty. Even on the face of the contract alone, there is therfore nothing to support that conclusion.

(b) The proper resolution of any inconsistency which may *arguendo* exist in this agreement, like any other, is best determined by the manner in which the parties actually performed under it. *Brooklyn Life Ins. Co. of New York v. Dutcher*, 95 U.S. 269, 24 L.Ed. 410 (1877); *Lalow v. Codomo*, 101 So.2d 390, 393

---

11. This view is strengthened by the fact that, soon after the contract was executed, it was agreed in a supplementary letter that, after the first six weeks, "the company will not schedule an employee to work a regular work week in excess of *fifty (50)* hours." [e.s.]

12. See note 4, *supra*.

(Fla. 1958); *4 Williston, supra,* §623. As to this important factor, there is no doubt that everyone, without issue, dispute, or complaint, treated the agreement as one which called for the overtime specifically agreed to, not the one required by the *ex post facto* application of the "forty hour work week" clause.

(c) Finally, subsequent to the time frame involved here—during which there was one amendment to the overtime practice, see note 6, *supra*—the employer and union, after intensive collective bargaining, further changed the contract to a straight hourly rate. This resulted in the same consequences as to overtime pay which the trial court's decision would have applied to the previous period. It may be presumed, however, that an amendment to an agreement is designed to serve some useful function, and its existence is strong evidence, therefore, that the contract was changed from what the parties believed and intended was provided before. See *Brewster v. Gage,* 280 U.S. 327, 50 S.Ct. 115, 74 L.Ed. 457, 463 (1930); *State ex. rel. Triay v. Burr,* 79 Fla. 290; 84 So. 61, 74 (1920).

The determination of the "regular rate" of pay is, as the Supreme Court has recently reiterated, a mixed question of law and fact. *Barrentine v. Arkansas-Best Freight System, Inc., supra,* 101 S.Ct. at 1446, 67 L.Ed.2d at 655. For the reasons we have outlined, an application of the facts shown by the record to the controlling law demonstrates the incorrectness of the order below. See cases collected, 51B C.J.S. Labor Relations §1310 (1968). It is therefore reversed and the cause remanded with directions to dismiss the complaint.[13]

Reversed.

---

13. We need not discuss the other issues presented by the appellant.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT
JANUARY TERM, A.D. 1982

Tuesday, February 9, 1982

SOUTH FLORIDA BEVERAGE CORPORATION,
Appellant,

vs.

EFRAIN FIGUEREDO, et al.,
Appellees.

Counsel for appellees having filed in this cause motion for rehearing and same having been considered by the court which determined the cause, it is ordered that said motion be and it is hereby denied.

Case No. 79-9888 (04)

IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICITION DIVISION

EFRAIN FIGUEREDO, et al.,
Plaintiffs,

v.

SOUTH FLORIDA BEVERAGE CORPORATION,
Defendant.

ORDER ON FINAL HEARING

THIS CAUSE came on for final hearing before the Court to determine whether the Defendant SOUTH FLORIDA BEVERAGE CORPORATION has violated the overtime pay provisions of the Fair Labor Standards Act, 19 U.S.C. Section 201 et seq. The Court having heard the testimony and examined the exhibits offered in evidence, finds the following:

FINDINGS OF FACT

1. The Defendant SOUTH FLORIDA BEVERAGE CORPORATION is a Florida corporation doing business as Pepsi-Cola Bottlers of Miami. Its gross sales exceed $250,000.00 annually and it engages in business outside the State of Florida.

2. The Plaintiffs were hired in accordance with the terms of written employment agreements, entered in July of 1975 and again in July of 1978, each of which provides that the regular work week is forty hours, consisting of five consecutive eight-hour days and for weekly fixed pay.

3. The Defendant's calculation of wages for work in excess of forty hours between June 8, 1976 and March 2, 1979, was based on the assumption that daily wages equal to one-fifth of the weekly wage stated in the contract was to cover all of the hours which Plaintiffs were required to work during the day.

4. The Defendant was aware of the existence of the Fair Labor Standards Act and its application to them and the Plaintiffs when both of the employment contracts were made, as well as during the time periods pertinent hereto.

5. Plaintiffs were paid one-fifth of their weekly salary for work performed on Saturday in accordance with a written agreement made between the parties, amending the first employment contract and continuing in practice through March 2, 1979. The Plaintiffs did not clock in or out on Saturdays, and such time was not computed in determining overtime accumulated by Plaintiffs. Each Plaintiff who worked Saturday is assumed to have worked eight hours.

6. The normal non-overtime work period established by the Defendant for these Plaintiffs was eight hours in a day and forty hours in a week.

7. The "regular rate" for each Plaintiff is his weekly pay specified in the employment agreements divided by 40.

CONCLUSIONS OF LAW

8. This Court has jurisdiction over the parties and the subject matter of this Complaint.

9. The Defendant is subject to the provisions of the Fair Labor Standard Act 29 U.S.C. Section 201 et seq.

10. The Defendant has violated the Fair Labor Standards Act 29 U.S.C.A. Section 107 by not paying Plaintiffs overtime compensation based on their "regular rate," as that term is legally defined.

11. Defendant's violation was willful as that term has been interpreted in construing the Fair Labor Standards Act.

12. The Defendant has failed to establish its burden of proving: (1) that it acted in good faith and (2) had reasonable grounds for believing its acts and omissions were not a violation of the Act.

13. The fourth affirmative defense of laches and estoppel,

the seventh affirmative defense of Plaintiffs' failure to file grievances and exhaust their remedies provided by the collective bargaining agreements, the eighth affirmative defense that Plaintiffs are exempt executive or administrative employees, the ninth affirmative defense that Plaintiffs were exempt pursuant to the Motor Carrier exemption, the tenth affirmative defense that Plaintiffs were exempt outside salesmen are all either insufficient as a matter of law or Defendants failure to offer evidence in their support.

14. The Defendant's payment of one-fifth the Plaintiffs' weekly salary for Saturday work does not constitute a premium payment as defined in the Act.

WHEREFORE, RAY MARIN

is appointed Special Master in this cause. The Master shall compute the weekly wage earned by the individual Plaintiffs during each week, between June 8, 1976, and March 2, 1979, that they worked for more than forty hours, utilizing the criteria set forth in this Judgment. From these wages earned by the individual Plaintiffs during their overtime weeks, the Master shall deduct the actual wages paid those Plaintiffs during those weeks and report to the Court the amount of overtime wages still due each individual Plaintiff. The Master's fee and costs are to be borne by the Defendant.

The Court reserves jurisdiction to enter a Judgment against the Defendant in favor of each Plaintiff for the amount of unpaid overtime compensation due each Plaintiff as found by the Master, plus an equal amount as liquidated damages, plus interest from the date of this Judgment.

The Court reserves jurisdiction to award Plaintiffs' attorneys Richard Kanner and Carl M. Lambert, a Judgment for Attorneys' Fees for bringing this action, and for costs.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida, this 10 day of October, 1980.

HERBERT M. KLEIN, Circuit Judge

Case No. 61,749

SUPREME COURT OF FLORIDA

Friday, May 28, 1982

EFRAIN FIGUEREDO, et al.,
Petitioners,

vs.

SOUTH FLORIDA BEVERAGE CORPORATION,
Respondent.

This cause having heretofore been submitted to the Court on jurisdicitonal briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

The Motion for Attorney's Fee filed by attorney for petitioners is hereby denied.

BOYD, OVERTON, ALDERMAN and McDONALD, JJ., Concur
ADKINS, ACTING C.J., Dissents

SECOND AMENDED COMPLAINT
(Caption Omitted)

Plaintiffs allege.

1. This is a class action complaint to recover damages for the defendant's violation of the Fair Labor Standard's Act 29 U.S.C.A. §201 et seq. Damages exceed $2,500.

2. The defendant is a Florida corporation doing business as Pepsi-Cola Bottling of Miami, and is an enterprise engaged in commerce in Dade County, as that term is defined in 29 U.S.C.A. §203 in that defendant is an enterprise (other than an enterprise which is comprised exclusively of retail or service establishments) whose annual gross volume of sales made or business done during all times material to this complaint exceeds $250,000 exclusive of excise taxes at the retail level which are separately stated.

3. The plaintiffs have been employed by the defendants during the past three years to deliver pre-sold beverages to various retailers in South Florida and, accordingly, come within the Act's definition of "employee," 29 U.S.C.A. §203.

4. The plaintiffs have been employed by the defendant during the past three years at an average wage of $250 for forty hours work a week, and these plaintiffs have worked, in addition to forty hours a week, an average in excess of five hours per week during this time.

5. The defendant, for the past three years, have violated the Fair Labor Standard's Act, 29 U.S.C.A. §207 by not paying plaintiffs and those other employees similarly situated, wages for employment in excess of forty hours, calculated at a rate of not less than one and one-half times the plaintiffs' regular rate of compensation.

6. The defendant's withholding of applicable overtime compensation during the past three years has been willful and in bad faith.

WHEREFORE plaintiffs pray to recover unpaid overtime compensation and interest accrued thereon for the three years preceding the filing of this complaint, and an equal amount of liquidated damages, a reasonable attorney's fee, and costs incurred in this action, and trial by jury.

(Certificate of Service and Signature Omitted)

SUPPLEMENT TO SECOND AMENDED COMPLAINT
(Caption Omitted)

Plaintiff supplements paragraph 2 of the Second Amended Complaint so that the third line thereof will now state "In Dade County, and various countries in the Caribbean and Latin and Central America."

(Certificate of Service and Signature Omitted)

DEFENDANT'S ANSWER AND DEFENSES
(Caption Omitted)

COMES NOW the Defendant, SOUTH FLORIDA BEVERAGE CORPORATION, pursuant to Rule 1.140 of the Florida Rules of Civil Procedure and files these its Answer and Defenses to the Second Amended Complaint, as to each individual Plaintiff, as follows:

1. The Defendant denies the allegations in Paragraph No. 1.

2. As to the allegations in Paragraph No. 2 of the Second Amended Complaint, the Defendant admits that it is a Florida corporation doing business as Pepsi-Cola Bottling Company of Miami and that it does business in Dade County, Florida and with various other countries in Latin America and that its annual gross volume of sales made or business done exceeds $250,000.00. The Defendant denies all other allegations contained in Paragraph No. 2.

3. As to the allegations in Paragraph No. 3 of the Second Amended Complaint, the Defendant admits that some of the named Plaintiffs have been employed by the Defendant for some of the time covered by the Second Amended Complaint. The Defendant denies all other allegations in Paragraph No. 3.

4. As to the allegations contained in Paragraph No. 4 of the Second Amended Complaint, the Defendant states that it is without knowledge.

5. The Defendant denies all allegations in Paragraph No. 5 of the Second Amended Complaint.

6. The Defendant denies all allegations contained in Paragraph No. 6 of the Second Amended Complaint.

7. As its first affirmative defense, the Defendant claims that all of the Plaintiffs employed by it were paid the overtime to which the were entitled, if any, under §7 of the Fair Labor Standards Act (29 U.S.C. §207), and the administrative regulations and interpretations thereof.

8. As its second affirmative defense, the Defendant claims that it paid overtime compensation to the Plaintiffs based pursuant to 29 U.S.C. §259, on a good faith reliance on advice of the Secretary of Labor or his agents in the form of official Wage/Hour Administrative Opinions, Interpretive Bulletins or on court cases under the FLSA which indicated or obviously implied that the overtime pay practices of which the Plaintiffs complain, were in fact legal and in compliance with the Fair Labor Standards Act.

9. As its third affirmative defense, the Defendant claims that any violation of the Fair Labor Standards Act was not intentional but was inadvertent, accidental and based on Defendant's good faith understanding of the requirements of the Fair Labor Standards Act and not for the purpose of denying any of the Plaintiffs their rights under the FLSA.

10. As its fourth affirmative defense, the Defendant claims that the Plaintiffs, and each of them, are barred in this case by laches and estoppel.

11. As its fifth affirmative defense, the Defendant claims that even if it is obligated for certain unpaid overtime for some of the named Plaintiffs, that all such obligations are restricted to a period no earlier than two years prior to the time each Plaintiff effectively commenced this lawsuit, under provisions of Section 6 of the Portal-To-Portal Act (29 U.S.C. §255), since any failure by the Defendant was not a willful violation.

12. As its sixth affirmative defense, the Defendant claims that even if it is obligated for certain unpaid overtime for certain of the named Plaintiffs, that pursuant to 29 U.S.C. §260, such Plaintiffs are not entitled to liquidated damages on such unpaid overtime since any failure by the Defendant was in good faith and based on reasonable grounds for believing that its act or omission was not a violation of the Fair Labor Standards Act.

13. As its seventh affirmative defense, the Defendant claims that the Plaintiffs are barred for failing to file grievances and pursue and exhaust the remedies provided such Plaintiffs under their collective bargaining agreements with the Defendant.

14. As its eighth affirmative defense, the Defendant claims that some or all of the Plaintiffs were exempt executive or administrative employees within the meaning of Section 13(a)(1) of the Fair Labor Standards Act, for some or all of the period of time covered by this lawsuit, and that the Defendant is therefore entitled to any exemption from the overtime requirements of the FLSA for such Plaintiffs.

15. As its ninth affirmative defense, the Defendant claims that some or all of the Plaintiffs for some or all of the time period covered by this lawsuit were exempt from the overtime provisions of the FLSA purusant to the motor carrier exemption, 29 U.S.C. §213(b)(1).

16. As its tenth affirmative defense, the Defendant claims that some or all of the Plaintiffs for some or all of the time period covered by this lawsuit, were outside salesmen, exempt from the overtime provisions of the FLSA purusant to 29 U.S.C. §213(a)(1).

17. As its eleventh affirmative defense, the Defendant states that each Plaintiff was paid in full pusuant to collective bargaining agreements between the Defendant and United Steelworkers of America and its Local Union 8430, the exclusive bargaining agent for all of the Plaintiffs.

18. As its twelfth affirmative defense, the Defendant states that some or all of the Plaintiffs' claims are barred by the statute of limitations which is two years prior to the date of the Supplement to the Second Amended Complaint, or in the alternative two years prior to the date of the First Amended Complaint, or in the alternative the date of the original Complaint for the four original Plaintiffs and the date of the other Plaintiffs filed their consent to become party plaintiffs.

19. As its thirteenth affirmative defense, the Defendant states that this Court is without jurisdiction over some or all of the Plaintiffs, the amount in controversy being insufficient to invoke this Court's jurisdiction.

20. As its fourteenth affirmative defense, the Defendant states that this Court is without jurisdiction over this case as a

class action since there is no necessity for bringing this action as a class action, the class has not been described with any degree of certainty, the Plaintiffs do not adequately represent the class and the interest of the Plaintiffs are not coextensive with the interests of any class members. Since each Plaintiff must consent to become a named Plaintiff before participating in this lawsuit, under the FLSA there is no viable class action.

21. As its fifteenth affirmative defense, the Defendant states that even if it is obligated for certain unpaid overtime compensation, this Court is without authority to award interest on such monies under the FLSA.

(Certificate of Service and Signature Omitted)

1975 COLLECTIVE BARGAINING AGREEMENT

HOURS OF WORK AND OVERTIME

Section 1.

The regular work week shall be FORTY (40) HOURS consisting of five consecutive eight hour days beginning on Monday and ending on Friday. The regular starting time for employees covered hereunder shall be between 6:00 a.m. and 7:00 a.m. (with the exception of special events employees, whose regular starting time shall be 7:30 a.m.).

• • •

Section 3.

Overtime shall be payable as follows:

Salaried pre-sell drivers shall receive, for all hours worked in excess of forty (40) in a given workweek, overtime pay in accordance with the procedure outlined in Interpretive Bulletin Section 778.114 of the Wage and Hour Administrator, entitled "Fixed Salary for Fluctuating Hours."

WAGES

	Effective July 28, 1975	Effective July 26, 1976	Effective July 25, 1977
PRE SELL/ TELL SELL DRIVERS			
After 30 days	$210.00	$220.00	$230.00
After 3 years	$230.00	$240.00	$250.00
After 5 years	$250.00	$260.00	$270.00

• • •

LONGEVITY INCREASE

Commencing with the signing of this Agreement, each employee shall receive after THREE (3) YEARS of continuous employment from his last date of hire, a longevity increase of ten cents (.10) per hour; after six (6) years of such continuous employment, then a further longevity increase of ten cents (.10) per hour. The amount of the longevity increase shall be computed on the basis of a 40 hour week; longevity increase will therefore be limited to $4.00 or [illegible]00 respectively, per week.

REPORTING AND CALL-IN PAY

Section 1.

An employee reporting to work on a scheduled workday and at his regular scheduled reporting time without being notified (either by telegram, mail or personally), the previous day that there will be no work, shall receive the equivalent of four (4) hours pay at his regular hourly or guaranteed rate.

1978 COLLECTIVE BARGAINING AGREEMENT

HOURS OF WORK AND OVERTIME

Section 1.

The regular work week shall be FORTY (40) HOURS consisting of five consecutive eight hour days beginning on Monday and ending on Friday. The regular starting time for employees covered hereunder shall be between 6:00 a.m. and 7:00 a.m. (with the exception of special events employees, whose regular starting time shall be 7:30 a.m.) and the regular work week for Bulk Merchandisers shall be forty (40) hours consisting of not more than five days to be schedule by management.

• • •

Section 3.

Overtime shall be payable as follows:

Route Merchandisers, Bulk Merchandisers and Bulk Tractor Trailer Drivers shall receive straight time pay for all hours worked in excess of forty (40) in a given workweek.

WAGES

ROUTE MERCHANDISERS

	Base Pay		
	July 24th. 1978	July 23rd. 1979	Oct. 1st. 1980
After 30 working days	240.00	250.00	260.00
After 3 years	269.00	279.00	289.00
After 5 years	303.00	313.00	323.00

BULK MERCHANDISERS

	Base Pay		
	July 24th. 1978	July 23rd. 1979	Oct. 1st. 1980
After 30 working days	225.00	235.00	245.00
After 3 years	259.00	269.00	279.00
After 5 years	283.00	293.00	303.00

REPORTING AND CALL-IN PAY

Section 1.

An employee reporting to work on a scheduled workday and at his regular scheduled reporting time without being notified (either by telegram, mail, telephone or personally), the previous day that there will be no work, shall receive the equivalent of four (4) hours pay at his regular hourly or rate.

PEPSI'S EXPERT WITNESS

Q: Do you have an opinion with regard to the method by which the employer or the defendant paid the plaintiffs during this period of time?

A. I have an opinion.

Q. What is that opinion?

A. These employees were paid on a daily basis with overtime, daily overtime on multiples of eight, and weekly overtime over 40 hours.

* * *

THE COURT: Were they paid overtime also—I see, even when it was less than 40 hours, overtime was being paid; is that right—on multiples of eight hours per day?

THE WITNESS: Yes, sir.

THE COURT: And there is no statutory obligation to do that; is that what you are saying?

THE WITNESS: No, sir; not under the Fair Labor Standards Act.

THE COURT: Pepsi just did it as a generous gesture.

THE WITNESS: It is an inference that I can't support with anything in the record. I don't know whether there were instructions to that effect or whether it was just because of the computer programming. I just don't know.

COMPTROLLER

Q. Does Pepsi admit that Pespi was not obligated by the Fair Labor Standards Act or any other federal law to pay what Pepsi has labeled overtime for hours when the employees worked less than 40?

A. Yes.

Q. Does Pepsi admit in the computation of overtime hours for less than 40 that Pepsi used increments of eight hours to determine the number of overtime hours?

A. Yes, it is called a daily formula basis.

* * *

Q. Well, Pepsi considered eight or increments of eight hours as the standard by which overtime hours would be computed less than 40.

A. Yes.

* * *

BY MR. KANNER:

Q. Mr. Fleischer, the question is, in computing, in Pepsi computing their overtime wages under the second contract, do you admit that Pepsi did not compute overtime based on a fixed 40-hour week?

A. Yes, I do.

Q. Now, does Pepsi admit that neither of the plaintiffs nor their union representatives or union officers were ever advised in writing that the 40-hour provision that I have read in Section One was not being followed?

MR. ALLEN: I object except to the extent during the period he was employed and if he knows.

THE COURT: Answer the question as amended by your lawyer.

THE WITNESS: I don't know if they were advised in writing.

BY MR. KANNER:

Q. You admit that the plaintiffs or their union leaders were never advised by writing or orally, notifying them of the change in this contract on the bulletin board which is called for in the employment contract?

A. Are you referring to the method of calculating overtime pay?

Q. Yes.

A. I would say that they did understand it.

Q. I am not asking for your conclusions. I am asking you whether management personnel or lower-echelon supervisory personnel of Pespi Cola displayed on the bulletin board, which is discussed on Page 26 of this contract, the fact that the fixed 40 hours was not going to be used in computing overtime.

* * *

THE WITNESS: Could you repeat the question?

BY MR. KANNER:

Q. Were the plaintiffs or the union people ever advised on the company bulletin board about the fact that the company was not complying with the 40-hour provisions of the contract?

A. I don't know.

Q. Were the plaintiffs or their union representatives ever notified in any manner that the company was not complying with this Paragraph One, the 40-hour provision?

A. To the best of my knowledge, yes, in verbal conversations.

Q. By whom?

A. At the negotiations—in other words, when we talked about overtime, as an example, when you started half time and if you have time-and-a-half on the other end of the scale, and you agree to straight time—and I will say that Carlos Suarez, being a professional negotiator, I would presume he understood the compromise that we reached.

Q. Now, do you admit, Mr. Fleischer, that your lawyers have

not furnished me with a solitary document in response to my motion that they produce all of the documents you used to compute overtime computations; they have not given me a solitary document that contains any reference to a daily rate to compensate the plaintiffs for all of the hours that the plaintiffs were required to work in the day or week?

MR. ALLEN: I object.

THE COURT: Sustained as to the form of the question.

THE WITNESS: I have no idea what my attorney has given you or not given you.

* * *

BY MR. KANNER:

Q. What documents does Pepsi Cola have in its control and possession that show that Pepsi Cola, from July of '75 forward, was paying on a daily basis to cover all of the hours employed during the day.

A. The payroll records that we have.

Q. Anything else?

A. I would just say the documents that my attorneys have presented.

PERSONNEL MANAGER

Q. Through these duties at Pepsi Cola, did you learn what the normal work week was for the truck drivers?

A. When?

Q. After July of 1975.

A. Well, the normal work week was determined by the union agreement.

Q. Now, during the time that you were personnel director, did Pepsi hire any route merchandisers or truck drivers outside the terms of the union agreement?

A. What do you mean outside of the agreement, the union agreement? Could you be a little bit more specific, please?

Q. Did Pepsi Cola have an agreement, in addition to the union agreement for its truck drivers and route merchandisers?

A. No, sir. Pepsi Cola only had one union agreement.

* * *

THE WITNESS: Every time I hire an employee, I hire him according to the necessities of the company and within the prescriptions of the union agreement.

THE COURT: That is what you told the employees, that they were going to work under this union agreement?

THE WITNESS: No. Of course, I instruct the employees about the working conditions of the company and they could become, you know—because they have—they go on probation, like one month probation, for a period of a probation, and then they could become members of the local union.

THE COURT: The next question is, did you ever hire people on a daily basis?

THE WITNESS: No.

PLAINTIFF

THE COURT: Did you have any conversations touching and concerning any written agreements?

THE WITNESS: Yes.

THE COURT: Tell me what they were.

THE WITNESS: We were to work—I was to work for 30 days on a temporary basis. After 30 days of working, I would have to work under the conditions of the contract, the union contract what was then in existence.

* * *

Q. Who sets your schedule, the number of stops that you are to make every day?

A. This is done by the company.

Q. Are you given a list or anything?

A. You are given invoices, and each invoice has a sequence number; and dependent on how many cases they have going out that particular day, depends on how many stops you have.

* * *

Q. What was the company policy relative to you completing your assigned stops prior to coming in in the evening?

THE WITNESS: You were told you had to finish your route.

BY MR. KANNER:

Q. And after March of '79, had those instructions changed?

A. In certain instances, the company will instruct you to be in and punched out by a set time, 3:30 or whatever.

* * *

Q. Did you go down to the Wage-and-Hour Department and inquire about the method of pay?

A. Yes.

Q. Approximately when?

A. Approximately, I would say, about a little over a year ago.

* * *

Q. How soon after your visit to Wage-and-Hour did Pepsi begin paying time-and-a-half?

THE WITNESS: It was exactly the second Friday after the Monday that I went to Wage-and-Hour. I went to Wage-and-Hour on a Monday. The second Friday after this Monday, we started receiving time-and-a-half.

* * *

Q. Mr. Wells, from your previous examination of these records and your own independent recollection, how often would you work five days in a week and not work more than 40 hours?

A. Not any.

* * *

Q. Were you ever told by anyone representing Pepsi Cola that the terms of the agreement, written agreement, were changed as to the number of hours for which you were employed?

A. No.

PLAINTIFFS' EXPERT

Q. Let me ask you about a daily salary. Do you have an opinion whether the defendant's payroll calculations during the first contract were predicated on a fixed daily salary for all hours that the truck drivers worked during the day?

A. You mean, a day rate, a fixed day rate?

No, I think I did point out that the day rate is a flat sum for a day's work without regard to the number of hours worked in the day or at the job.

In every case, the employee was paid the so-called day rate only for hours up to eight in a day.

Q. Now, during the second contract, Mr. Gillespie, which was in July of '78, do you have an opinion whether the defendant's payroll calculations during the second contract were calculated on a fixed daily salary, during the second contract.

A. No, they were predicated on an hourly rate, again, in the same fashion as in the previous period, except that here, in that second period they paid the full straight time for any overtime worked. They didn't attempt to break it down and pay a lower rate.

Q. Now, frequently, would the employees work for five days and not accumulate hours in excess of 40?

A. It would be very infrequently. In fact, I don't recall any instance in which a full five days may have been worked.

* * *

It is a variation of the fluctuating work week, but it does not comply with the fluctuating work week principle. The work week was in fact divided into a straight time and an overtime work week in which the 48 hours that was recorded as straight time and one-and-a-half regarded as overtime; whereas in fact, the employee had worked 49-and-a-half hours, so there were nine-and-a-half hours of overtime.

The splitting of the work week in that fashion is not regarded as compliance with the Wage and Hour regulations.

* * *

A. No. Specifically, if you wish, you can read an expert from 778.501. 778.501 deals with the split-day plan; and under this plan, the normal or regular work day is artificially divided into two portions, one of which is arbitrarily labeled the straight-time portion of the day, and the other the overtime portion, and that is just about what occurred here.

* * *

In this case, the day was broken down into a straight-time period of eight hours and anything over the eight was shown as overtime in this particular week.

The employee was paid, however, only for the four eight-hour days, 32 hours, at $176.00, and then the total of 44.53 hours was divided into that $176.00 in order to come up with an hourly rate which they then divided and paid half time on.

Now, actually, the employee was paid for only 32 hours rather than the full 44.53 before determining what the hourly or regular rate would be.

Here again, you have Section 778.315, that situation, in which all straight time must be paid before overtime can be claimed to be paid.

Consolidation of transcriptions for Carlos Castro, with footnotes on sheet #2, explaining application of Regulations to each type of payment.

		Method of Payment			Payment Legally Required		
		Week Ending 12/24/76					
		Base Salary $220.00 — Worked 49.5 Hours					
		Hours	Rate	Paid	Hours	Rate	Due
See Notes a,b,c,d.	Straight-time(a)	48(c)	5.50	264.00(b)	49.5	5.50	272.25
	Overtime(b)	1.5(d)	2.665	3.98(d)	9.5	2.75	26.13
	Total			267.98			298.38
	Underpayment $30.40						
		Week Ending 1/14/77					
		Base Salary $220.00 — Worked 44.53 Hours					
a,b,c,d, e,i.	Straight-time(c,a)	32(i)	5.50	176.00(b)	44.53	5.50	244.92
	Overtime(d)	12.53	2.095	26.25(d)	4.53	2.75	12.46
	Total(e)			202.25			257.38
	Underpayment $55.13						
		Week Ending 3/31/78					
		Base Salary $254.00 — Worked 62.82 Hours					
a,b,c,d.	Straight-time(a,c)	48	6.35	304.80(b)	62.82	6.35	398.91
	Overtime(b,d)	14.82	2.425	35.95(d)	22.82	3.175	72.45
	Total			340.75			471.36
	Underpayment $131.11						
		Week Ending 6/2/78					
		Base Salary $254.00 — Worked 51.48 Hours					
a,b,f,i.	Straight-time(a,i)	40	6.35	254.00(b)	51.48	6.35	326.90
	Overtime			——	11.48	3.175	36.45
	Holiday Premium(f)	8	6.35	50.80(f)	8	6.35	50.80
	Total(i)			304.80			414.15
	Underpayment $109.35						
		Week Ending 6/30/78					
		Base Salary $254.00 — Worked 43.20 Hours					
a,b,h,i.	Straight-time(a,i)	32	6.35	203.20(b)	43.20	6.35	274.32
	Overtime				3.20	3.175	10.16
	Sick Pay(h)	8	6.35	50.80(h)	8	6.35	50.80
	Total			254.00			335.28
	Underpayment $81.28						

		Method of Payment			Payment Legally Required		
		Week Ending 7/28/78					
		Base Salary $269.00 — Worked 42.01 Hours					
		Hours	Rate	Paid	Hours	Rate	Due
a,b,c,d,	Straight-time(a,c)	32	6.725	215.20(b)	42.01	6.725	282.52
j.	Overtime(d,j)	10.01	6.725	67.32	2.01	3.36	6.75
	Anniversary Pay			53.80			53.80
	Total			336.32			343.07
	Underpayment $6.76						
		Week Ending 8/4/78					
		Base Salary $269.00 — Worked 48.51 Hours					
a,b,c,d,	Straight-time(a,c)	40	6.725	269.00(b)	48.51	6.725	326.23
j.	Overtime(d,j)	8.51	6.725	57.23	8.51	3.3625	28.62
	Total			326.23			354.85
	Underpayment $28.61						

(*a*) —Record shows payment at hourly rate -NOT- salary, as defined in Reg. *778.1*.

(*b*) —All straight-time MUST be paid before overtime pmt can be claimed. *778.315*.

(*c*) —Work week artificially divided into straight-time and overtime. *778.202(c)*.

(*d*) —Split-week method parallels fictitious "split-day" plan. *778.501(b)*.

(*e*) —Overtime was worked, BUT total pmt does not equal agreed salary. *778.114*.

(*f*) —No part of holiday pay may be credited toward statutory overtime. *778.219*.

(*g*) —Same principle applies to anniversary pay as to holiday pay. *778.224*.

(*h*) —Same principal applies to sick pay as to holiday pay. *778.218(a)* & *778.224*.

(*i*) —Salary reductions in short weeks indicate pmt on an hourly rate. *778.306(a)*.

(*j*) —Regular rate (778.108) is NOT the overtime rate *778.110(a)*.

§207. Maximum hours

(a)(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

LIST OF PLAINTIFFS

Arturo Artiles	Luis Armenteros	Salvador Iglesias
Julio Fuentes	Gabriel A. Infiesta	Jose Navarjo
Carlos J. Reyes	Edelio Galindo	Nicolas Castillo
Jorge R. Bermeosolo	Francisco Almaquer	Pedro Casanugua
Pedro Rodriguez	Lonnie J. Marshall	Jose R. Suarez
Manuel Fernandez	Roberto Fernandez	Gervasio Llorente
Carl J. Brinson	Lasaro Riestra	John Shuler
Raul Navarro	Felipe Hernandes	Luis E. Hernandez
Carlos Castro	Oliden Lobez	Timoteo H. Garcia
Edward C. Stewart	Delfin Guanche	Miguel Abosaid
Sergio L. Ibanez	Hilario Lopez	Alberto Nuno
Steve L. Carroll	Roberto Garcia	Nicholas A. Romano
Jose Suarez	Humberto Sabina	Enrique Santana
Angel Alvarez	Osvaldo Ortega	Julio Fornes
Alberto L. Rigua	Guillermo Hernandez	Efrain M. Figueredo
Marty Pilafian	Jim D. Sherman	Felton L. Wells
Irvin Johnson	Benjamin Wright	Roberto Cruz
Larry D. Williams	Jorge L. Romero	Miguel Hondal
Andres Canino	Pedro Avila	Jorge Santiesteban
Edgar Young	Alphonso Cunningham	J. R. Alvarez
Guido Almeida	Robert Porter	Juan Garcia

Table of Contents.

Opinions below	1
Statute and regulations involved	2
Statement of the case	3
Argument	8
I. The writ should be denied because it was not timely filed	8
II. The writ should be denied because there is no substantial federal question warranting review	11
Conclusion	17
Appendix A: Corporate affiliates of South Florida Beverage Corporation	19

Table of Authorities Cited.

Cases.

American Railway Express Co. v. Levee, 263 U.S. 19 (1923)	8
Ansin v. Thurston, 101 So.2d 808 (Fla. 1958)	8, 10
Bay Ridge Operating Co. v. Aaron, 334 U.S. 446 (1948)	7, 11, 13
Brennan v. Elmer's Disposal Service, Inc., 510 F.2d 84 (9th Cir. 1975)	11n
Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1945)	12n
Harris v. Pennsylvania R.R., 361 U.S. 15 (1959)	12n
Lake v. Lake, 103 So.2d 639 (Fla. 1958)	8
Nielsen v. City of Sarasota, 117 So.2d 731 (Fla. 1960)	10
Norfolk & Suburban Turnpike Co. v. Virginia, 225 U.S. 264 (1912)	10n

Norris v. Alabama, 294 U.S. 587 (1935) 12n

Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968) 12n

Shaw v. Shaw, 334 So.2d 13 (Fla. 1976) 9

Walling v. Youngerman-Reynolds Hardwood Co., 325 U.S. 419 (1945) 7, 11, 13

Westerman v. Shell's City, Inc., 265 So.2d 43 (Fla. 1972) 9

Wilkerson v. McCarthy, 336 U.S. 53 (1949) 12n

Williams v. Florida, 399 U.S. 78 (1970) 8

Yadav v. Coleman Oldsmobile, Inc., 538 F.2d 1206 (5th Cir. 1976) 16

STATUTES AND CONSTITUTIONAL PROVISIONS.

28 U.S.C. § 1257 10

28 U.S.C. § 2101(c) 8

Fair Labor Standards Act, 29 U.S.C.
§§ 201 *et seq.* 2, 4, 5, 11n, 13
Section 7(a)(1) 2, 4, 13
Section 7(e)(5) 5
Section 7(e)(6) 5
Section 7(e)(7) 5
Section 7(f) 11n, 12n

Florida Constitution, Article V
§ 3 8
§ 3(b) 9
§ 3(b)(1) 9
§ 3(b)(2) 9
§ 3(b)(3) 9, 10

MISCELLANEOUS.

29 C.F.R.
§ 778.112 2, 5, 7, 12, 14 et seq
§ 778.114 2, 4, 5, 7, 14 et seq
§ 778.405 12n
Supreme Court
Rule 17.1(b) 11
Rule 17.1(c) 11
Wage-Hour Opinion Letter No. 950 (Feb. 12, 1969) 16

No. 81-2366.

In the
Supreme Court of the United States.

OCTOBER TERM, 1981.

EFRAIN FIGUEREDO, ET AL.,
PETITIONERS,

v.

SOUTH FLORIDA BEVERAGE CORPORATION,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT.

Brief in Opposition to Petition for a Writ of Certiorari.

Opinions Below.

The order of the trial court (the Circuit Court for Dade County) was entered on October 10, 1980 (Pet. App. 24-26). The decision of the District Court of Appeal of Florida, Third District, was filed on December 22, 1981 and is reported at 409 So.2d 490 (Pet. App. 12-22). A motion for rehearing was denied on February 9, 1982 (Pet. App. 23). The Florida Supreme Court denied a petition for certiorari on May 28, 1982 (Pet. App. 27).

Statute and Regulations Involved.

Section 7(a)(1) of the Fair Labor Standards Act, 29 U.S.C. § 207(a)(1), provides as follows:

> Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 C.F.R. § 778.112 provides:

> *Day rates and job rates.* If the employee is paid a flat sum for a day's work or for doing a particular job, without regard to the number of hours worked in the day or at the job, and if he receives no other form of compensation for services, his regular rate is determined by totaling all the sums received at such day rates or job rates in the workweek and dividing by the total hours actually worked. He is then entitled to extra half-time pay at this rate for all hours worked in excess of 40 in the workweek.

29 C.F.R. § 778.114(a) provides:

> *Fixed salary for fluctuating hours.* (a) An employee employed on a salary basis may have hours of work which

fluctuate from week to week and the salary may be paid him pursuant to an understanding with his employer that he will receive such fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, whether few or many. Where there is a clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than for working 40 hours or some other fixed weekly work period, such a salary arrangement is permitted by the Act if the amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours he works is greatest, and if he receives extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one half his regular rate of pay. Since the salary in such a situation is intended to compensate the employee at straight time rates for whatever hours are worked in the workweek, the regular rate of the employee will vary from week to week and is determined by dividing the number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week. Payment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay requirement because such hours have already been compensated at the straight time regular rate, under the salary arrangement.

Statement of the Case.

This is an action by 63 route drivers against their employer, South Florida Beverage Corporation (the "Company"),[1] for

[1] South Florida Beverage Corporation is a wholly-owned subsidiary of Holiday General Corporation, which is in turn a wholly-owned subsidiary

overtime compensation payments allegedly required by the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* ("FLSA").

As delivery truck drivers, petitioners spent virtually their entire working time servicing routes away from the Company's premises and without any direct supervision or control (Record Appendix in District Court of Appeal ("R.") 57-58, 217, 230-232). Their actual work hours fluctuated from day to day and week to week, depending on such factors as traffic and the speed and ability of the driver (Pet. App. 15; R. 52, 57-58, 216-217, 230-232, 561-580). The drivers sometimes worked more, and sometimes less, than eight hours per day and forty hours per week, respectively. *Id.*

In 1975, the drivers selected as their exclusive representative for collective bargaining purposes Local 8430 of the United Steelworkers of America (the "union") (Pet. App. 32; R. 174). As a result of collective bargaining, the parties' 1975-1978 agreement provided that the drivers would receive overtime pay computed "in accordance with the procedure outlined in Interpretive Bulletin Section 778.114 of the Wage and Hour Administrator, entitled 'Fixed Salary for Fluctuating Hours'" (Pet. App. 14; R. 391, 398). At the same time, the parties entered into a sideletter providing that:

> For the first six weeks after the contract is signed, the Company may schedule employees to work in excess of *50* hours in a given work week. Thereafter, under normal circumstances, the Company will not schedule an employee to work a regular work week in excess of *fifty* (*50*) hours.

---

of General Cinema Corporation. Affiliated corporations (which are directly or indirectly owned by General Cinema Corporation) are set forth in Appendix A.

(R. 419, 421; *Plaintiffs' Exhibit 1* (emphasis added).) Shortly thereafter, the union requested and the Company agreed to treat Saturday work separately in determining weekly overtime pay, as is permitted by 29 U.S.C. § 207(e)(6) (premium Saturday pay not included in "regular rate"). *See* Pet. App. 15 n.5.

During the term of the 1975-1978 collective bargaining agreement, the Company paid the drivers a guaranteed, fixed sum of one-fifth of their designated salary for each day that they performed some work, regardless of the number of hours worked (Pet. App. 15; R. 235-236, 566, 569). In accordance with this practice, a driver was paid a full day's pay even if he worked less than eight hours that day (R. 187-189). If a driver worked more than forty hours in a particular week the Company, in accordance with guidelines published by the Wage and Hour Division of the U.S. Department of Labor (R. 383, 452), computed the driver's "regular rate" for that week by dividing the designated weekly salary (excluding any premium or non-statutory overtime payments as provided in §§ 7(e)(5) and 7(e)(7)) by the hours worked during that week (Pet. App. 15). The Company then paid such drivers overtime compensation, in addition to the compensation already paid for that week, at one-half their "regular rate" for each hour worked over forty (Pet. App. 15). The reason for this method of computing overtime was that under a "daily rate" arrangement, the total "daily rate" payments which the drivers received compensated them at "straight time" rates for whatever hours they worked that week. Therefore, in order to provide the employees with one and one-half times their "regular rate," an additional payment for overtime hours at one-half the "regular rate" for that week was necessary (Pet. App. 15, 17, 18 n.7; 29 C.F.R. § 778.112; *cf. id.* § 778.114).

The Company consistently followed these pay practices during the term of the 1975-1978 agreement (R. 236, 241-245, 299-304, 317, 319, 335-336, 385-386, 569). At no time did

petitioners — several of whom were officers of the union (R. 31, 39, 55, 182) — or any other drivers file any grievance or even suggest that the Company was violating the agreement (R. 176-177, 216-218, 250-251, 408, 431, 584). Nor did the union. *Id.*

In the 1978 collective bargaining negotiations (in which several of the petitioners participated), the union proposed a change to an hourly method of pay, but this proposal was rejected (R. 76, 81-86, 199, 213-215, 575-579). As a compromise, the parties agreed not to change the underlying "daily rate" method of pay, but agreed to increase overtime compensation to an additional payment at the employee's "straight time" rate for that week (*id.*; Pet. App. 15). Thus, the Company agreed as a contractual matter to a *higher* overtime premium than was required by the FLSA, but less than petitioners now claim to be due (Pet. App. 15).

Under the 1978 agreement, the Company continued to pay employees on a "daily rate" basis without any objection that this method of payment violated the 1978 agreement. Although one driver apparently complained to the Department of Labor concerning the Company's method of overtime pay (Pet. App. 44), the Department instituted no proceedings and made no suggestion that the Company was in violation of the FLSA. Petitioners thereafter brought this action in the Circuit Court for Dade County, Florida.

After a non-jury trial, the Circuit Court issued an order, without opinion, concluding that the Company had not computed overtime pay in accordance with the requirements of the FLSA (Pet. App. 24-26). The trial court found that the Company had paid overtime on the basis "that daily wages equal to one-fifth of the weekly wage stated in the contract was to cover all of the hours which [the employees] were required to work during the day" (Pet. App. 24). However, relying "almost entirely upon a single clause" in the governing

collective bargaining agreement (Pet. App. 13-14), the trial court ruled that the Company was required to pay overtime on the basis that the employees received fixed pay for fixed hours (Pet. App. 25).

On appeal, the District Court of Appeal of Florida, Third District, ruled that the Company had not violated the FLSA. Relying on this Court's decisions in *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419 (1945), *Bay Ridge Operating Co.* v. *Aaron*, 334 U.S. 446 (1948), and progeny, the District Court of Appeal ruled that:

> the polestar in the determination of the "regular rate" question is the reality of the particular situation, that is, what hours and methods of pay were adopted "in actual fact" by the employer and employee.

(Pet. App. 14.) On the basis of the "actual facts," including the contractual provision referring to § 778.114, the Company's consistent and unchallenged practice over the term of two collective bargaining agreements, and the bargaining history of the second of those agreements (Pet. App. 15-16, 21-22), the District Court of Appeal found that "everyone, without issue, dispute, or complaint, treated the agreement" as one under which "a driver received a guaranteed payment of one-fifth of his designated weekly salary for each weekday he reported for work no matter how many hours he worked on that particular day" (Pet. App. 15, 22). Since the employees were "paid on a flat-sum-per-day-regardless-of-hours-worked basis" (Pet. App. 14), the court concluded that the Company's method of computing overtime pay was precisely the one authorized by the applicable regulations of the U.S. Department of Labor, 29 C.F.R. § 778.112; *cf. id.* § 778.114. *See* Pet. App. 15, 19.

Argument.

I. The Writ Should be Denied Because It was Not Timely Filed.

The petition for certiorari should be denied because it was not filed in timely fashion. The District Court of Appeal rendered final judgment on December 22, 1981 and denied rehearing on February 9, 1982. Any petition for certiorari therefore was required to be filed on or before May 10, 1982. 28 U.S.C. § 2101(c). In fact, the petition was not filed until June 25, 1982.

Petitioners contend, in reliance on *American Railway Express Co.* v. *Levee*, 263 U.S. 19 (1923), that "the time for filing here is computed from the date the Florida Supreme Court refuses to accept its discretionary jurisdiction" (Pet. 2). Petitioner's reliance on *Levee* is misplaced because in this case, unlike *Levee*, the state Supreme Court did not have jurisdiction, discretionary or otherwise, to review the judgment in question.

On July 1, 1957, the Florida state Constitution was amended to establish the district courts of appeal as "*courts of final, appellate jurisdiction*," *Lake* v. *Lake*, 103 So.2d 639, 642 (Fla. 1958) (emphasis in original). *Accord, Ansin* v. *Thurston*, 101 So.2d 808, 810 (Fla. 1958), *cited with approval, Williams* v. *Florida*, 399 U.S. 78, 80 n.5 (1970).[2] At the same time, the jurisdiction of the Florida Supreme Court was sharply curtailed. Florida Constitution, Article V, § 3. That court is required to hear appeals in cases "imposing the death penalty," "declaring invalid a state statute or a provision of the state constitution," or involving certain other specific situations not

---

[2] The petitioner in *Williams* was represented by the same attorney who represents petitioners herein.

applicable here. Fla. Const., Art. V, § 3(b)(1),(2). In addition, the Florida Supreme Court may, in its discretion, review decisions in a narrowly-circumscribed classification of cases. *Id.*, Art. V, § 3(b). The principal provision concerning the Florida Supreme Court's discretionary jurisdiction — and the sole ground invoked by petitioners in their brief to the Florida Supreme Court — confers the discretion to review a decision of a district court of appeal that "expressly and directly conflicts" with a decision of another district court of appeal or of the state Supreme Court "on the same question of law." *Id.*, Art. V, § 3(b)(3).[3]

This case did not come within that category. There was no decision of the Florida Supreme Court, or of any district court of appeal, which "expressly and directly" conflicted with the decision in this case "on the same point of law." Both of the cases relied upon by petitioners in the Florida Supreme Court (*see* Pet. 6) involved factual and legal issues which were entirely different from those involved here. *Westerman* v. *Shell's City, Inc.*, 265 So.2d 43 (Fla. 1972), involved a breach of an oral contract to sell a liquor license. *Shaw* v. *Shaw*, 334 So.2d 13 (Fla. 1976), involved a trial court's award of alimony in connection with a divorce decree. Neither case involved the Fair Labor Standards Act or interpretation of collective bargaining agreements; indeed, neither involved labor or employment-related matters of any kind.[4]

---

[3] Prior to 1968, the Florida Supreme Court had the discretion to review decisions of the district courts of appeal that were "in direct conflict" with such other decisions. In 1968, the Florida Constitution was amended to narrow this jurisdiction to its present scope.

[4] Petitioners contended in the Florida Supreme Court that the decision below "expressly and directly" conflicted with the cited cases because (in petitioners' view) the District Court of Appeal "reweighed the evidence" (*see* Pet. 6) in a manner allegedly proscribed by *Shaw* and *Westerman*. Wholly apart from the merits of such a contention, the Florida Supreme Court has made clear that Article V, § 3(b)(3) does not confer jurisdiction to review the particular application of legal principles to unique factual situations, but

Although the Florida Bar has repeatedly been warned that Article V, § 3(b)(3) does not convert the Florida Supreme Court into a "'court of selected errors,'" *Nielsen* v. *City of Sarasota*, *supra*, 117 So.2d at 734, petitioners sought to obtain two appeals on the merits in the Florida state courts. As the Florida Supreme Court has repeatedly held, *see, e.g.*, *Ansin* v. *Thurston*, *supra*, it lacks jurisdiction to provide such a second appeal. The District Court of Appeal therefore was the highest court of Florida in which a decision could be had, 28 U.S.C. § 1257, and any petition for certiorari was due within ninety days of that court's denial of rehearing.[5]

---

rather to review "the announcement of a *rule of law*" which conflicts with established precedent or to review a decision which reaches a conflicting conclusion in a case involving *substantially the same controlling facts* as were involved in the allegedly conflicting precedents. *Nielsen* v. *City of Sarasota*, 117 So.2d 731, 734 (Fla. 1960) (emphasis in original).

[5] In its Order, the Florida Supreme Court stated that it had "determined that it should decline to accept jurisdiction" (Pet. App. 27), but did not expressly state the reason for this determination. In these circumstances, this Court's announcement in *Norfolk & Suburban Turnpike Co.* v. *Virginia*, 225 U.S. 264, 269 (1912), is applicable:

> we now state that, from and after the opening of the next term of this court, where a writ of error is prosecuted to an alleged judgment or a decree of a court of last resort of a State declining to allow a writ of error to or an appeal from a lower state court, unless it plainly appears, on the face of the record, by an affirmance in express terms of the judgment or decree sought to be reviewed, that the refusal of the court to allow an appeal or writ of error was the exercise by it of jurisdiction to review the case upon the merits, we shall consider ourselves constrained to apply the rule announced in the *Crovo Case*, and shall therefore, by not departing from the face of the record, solve against jurisdiction the ambiguity created by the form in which the state court has expressed its action.

II. The Writ Should be Denied Because There is No Substantial Federal Question Warranting Review.

This case presents no issue which warrants the granting of certiorari. There is no constitutional question. Since the case arose in the Florida state court system, this case obviously involves no conflict among the circuits. There is no conflict alleged between the decision below and any decision of a federal court of appeals or state court of last resort.[6] Cf. Supreme Court Rule 17.1(b). The petitioners do not contend that the decision below conflicts with any decisions of this Court. Supreme Court Rule 17.1(c). Indeed, the petitioners do not take issue with the reliance by the District Court of Appeal (Pet. App. 14-15) upon this Court's decisions in *Walling* v. *Youngerman-Reynolds Hardwood Co., supra, Bay Ridge Operating Co.* v. *Aaron, supra*, and progeny.

The District Court of Appeal's application of the FLSA likewise presents no "important question of federal law." Supreme Court Rule 17.1(c). The decision below involves no question of general statutory interpretation, but only the application of settled principles to the particular facts of this case. The decision below thus affects only the parties thereto, and has no general legal significance.

---

[6] *Brennan* v. *Elmer's Disposal Service, Inc.*, 510 F.2d 84 (9th Cir. 1975), which petitioners claim is "[t]he closest case factually on point," is neither factually similar nor legally apposite. That case involved a so-called "Belo"-type plan in which an employer pays its employees a weekly salary in a fixed amount which *includes* overtime pay. 29 U.S.C. § 207(f) establishes strict prerequisites for such a plan, including an agreement which specifies the employees' regular rate and provides for overtime compensation and a weekly guarantee of pay which covers no more than 60 hours. In *Elmer's Disposal Service*, these statutory requirements were not met.

This case, by contrast, does not involve a "Belo" contract or § 207(f). The rates of pay established by the parties' collective bargaining agreements did not *include* overtime, but rather provided for *additional* overtime pay, computed on a "fluctuating hours" basis.

The "Questions Presented" by petitioners underscore the lack of a substantial federal question (Pet. 1). The first "Question Presented" concerns the scope of review of a Florida appellate court over a Florida trial court — an issue of state law.[7]

The second "Question Presented" — whether the "daily rate" method of pay is "appropriate" in "the absence of an explicit agreement" when "the daily schedule is controlled by the employer" — presents no substantial issue under established federal law. The Department of Labor's regulation concerning day rates, 29 C.F.R. § 778.112, upon which the District Court of Appeal specifically relied (Pet. App. 17), does not require an "*explicit* agreement," and is applicable regardless of whether "the daily schedule is controlled by the employer."[8] There is no sound reason — and none is offered by petitioners — for this Court to require the Department

---

[7] None of the decisions of this Court cited by petitioners (Pet. 7) are remotely similar to this case. *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697 (1945), involved the legal effect of an employee's release of FLSA claims. The Court ruled that the legal effect depended on whether the release was intended as a full settlement of the employee's claims or only a waiver of liquidated damages. *Id.* at 703. In so ruling, the Court held that although the state courts had made no finding on that issue, the Court was not precluded from reviewing the evidence.

The remaining decisions cited bear even less resemblance to this case. *Norris* v. *Alabama*, 294 U.S. 587 (1935), involved the exclusion of blacks from a grand jury which indicted a black for rape. *Wilkerson* v. *McCarthy*, 336 U.S. 53 (1949), and *Harris* v. *Pennsylvania R.R.*, 361 U.S. 15 (1959), involved the special status of jury verdicts for employees under the Federal Employers Liability Act. *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968), involved a *federal* court of appeals ruling that a corporation was barred from bringing an antitrust action against an affiliated corporation under the *in pari delicto* theory.

[8] Petitioners' reference to 29 C.F.R. § 778.405 is completely misplaced. That regulation concerns "Belo" contracts under Section 7(f), *see* note 6, *supra*, and has nothing to do with "daily rate" or "fluctuating workweek" arrangements.

of Labor to engraft these additional requirements onto its regulation.[9]

In any event, the District Court of Appeal properly concluded that the Company's "daily rate" method of pay was lawful in this case.

Under the FLSA, employees must be paid for hours worked in excess of forty per week at one and one-half times their "regular rate." 29 U.S.C. § 207(a)(1). As this Court has repeatedly held, an employee's "regular rate" within the meaning of the FLSA "must be drawn from what happens under the employment contract" between the employee and his employer. *Bay Ridge Operating Co.* v. *Aaron*, *supra*, 334 U.S. at 464; *see Walling* v. *Youngerman-Reynolds Hardwood Co.*, *supra*. It is undisputed as to "what happened" in this case: both collective bargaining agreements and the sideletter contemplated fixed pay for fluctuating hours; for over three years, over the term of these two agreements, "employees were, in fact, paid on a flat-sum-per-day-regardless-of-hours-worked basis" (Pet. App. 14), and this practice was "accepted by the drivers and their union" without any complaint that this practice violated those agreements (Pet. App. 13; R. 176-177, 216-218, 584). In these circumstances, the District Court of Appeal properly concluded that the parties in fact agreed to a fixed rate for fluctuating hours and not a fixed rate for fixed hours. The court's conclusion was supported by (among other things) the following *undisputed* facts:

---

[9] Petitioners' contention proceeds from two erroneous factual predicates. First, the Company did *not* have daily control of the work schedule or control over the actual hours worked by employees. Second, there was overwhelming evidence to support the conclusion of the District Court of Appeal that the parties "in actual fact" adopted the "flat-sum-per-day-regardless-of-hours-worked basis" by which the Company computed overtime.

1. The 1975-1978 collective bargaining agreement provided that overtime would be paid in accordance with 29 C.F.R. § 778.114, which contemplates fixed pay for *fluctuating* work hours (R. 391, 398).

As the District Court of Appeal noted (Pet. App. 21), if the parties had intended to provide fixed pay for fixed hours, they never would have included this provision in the contract.

2. At the time that the 1975-1978 agreement was negotiated, the parties confirmed in a letter of understanding that the "regular work week" would not exceed *fifty* hours under normal circumstances (R. 419, 421; *Plaintiffs' Exhibit 1*).

Once again, if the parties had intended to provide fixed pay for a fixed workweek of 40 hours, they never would have agreed to such a sideletter.

3. At all times, the drivers' work hours in fact fluctuated from day to day and week to week, sometimes more and sometimes less than 8 hours per day or 40 hours per week, respectively (R. 52, 57-58, 216-217, 230-232, 561-580).

4. At all relevant times the Company paid the drivers a fixed sum for each day that they worked, even if they worked less than eight hours in the day (R. 235-236, 566, 569). One of the drivers who is a petitioner herein specifically admitted that such was the case (R. 187-189).

The Company's payment of the full daily rate for days on which an employee worked less than eight hours is particularly significant, because it is inconceivable that the Company would have paid a full day's pay for a "short" workday unless it was contractually obliged to do so.[10]

---

[10] Having accepted for several years the benefit of receiving a full day's pay for "short" workdays, it is completely inconsistent for petitioners to claim

5. The Company consistently followed its practice for over three years, during the term of two successive collective bargaining agreements (R. 236, 241-245, 299-304, 317, 319, 335-336, 385-386, 569).

6. During the terms of those two agreements, neither the petitioners — several of whom were officers of the union (R. 31, 39, 55, 182) — nor the union filed any grievance or even suggested that the Company was violating the collective bargaining agreements (R. 176-177, 216-218, 250-251, 408, 431, 584).

The District Court of Appeal was warranted in concluding that no grievance or complaint was raised because "everyone" recognized that the Company's practice *conformed* to the parties' actual agreement or understanding.[11]

7. In the 1978 collective bargaining negotiations (in which several of the drivers participated), the union proposed a change to an hourly method of pay but this proposal was rejected (R. 82-86, 199, 213-215, 575-579).

This bargaining history shows that the agreements did *not* in fact establish an hourly method of pay.

8. In the 1978 negotiations, the parties agreed to increase overtime compensation from the additional half-time required by the FLSA to an additional straight-time. *Id.*

This bargaining history was extremely significant to the court, because if the 1975 agreement had established a fixed rate of pay, and a requirement of an *additional*

---

that there was no such arrangement and that they should in addition have received overtime pay computed on a fixed hours basis instead of a fluctuating hours basis.

[11] In short, the drivers' failure to object to the Company's method of payment was *not* merely a waiver of rights but a recognition that no contractual rights were being violated.

> time and one-half for overtime hours, the union never would have sought (much less agreed to) such a change (Pet. App. 22).

Against this evidence, petitioners place virtually their entire reliance on the provision of the 1975-1978 agreement that "the regular workweek" would be forty hours (Pet. 3). However, in light of the contract's reference to § 778.114, the letter of understanding referring to a workweek of fifty hours or more, and the parties' longstanding and uncontested practice, the District Court of Appeal properly concluded that this single provision was not dispositive:

> Viewed in this light, the forty-hour provision simply does not mean — or even say — what the [trial] court held it did. Indeed, it does not even speak to the real issue in the case — the "regular *rate*" of the drivers. Instead, it provides only that the "regular *work week*" is forty hours . . . .

(Pet. App. 21; emphasis in original.)

In these circumstances, the District Court of Appeal properly concluded that the parties' agreement was one for a daily rate method of payment. It therefore followed that the manner in which the Company computed overtime was proper. 29 C.F.R. § 778.112; *Yadav* v. *Coleman Oldsmobile, Inc.*, 538 F.2d 1206, 1207-1208 (5th Cir. 1976); Wage-Hour Opinion Letter No. 950 (Feb. 12, 1969).

Conclusion.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN H. MASON,
ROPES & GRAY,
225 Franklin Street,
Boston, Massachusetts 02110.
(617) 423-6100
Counsel for Respondent.

Of Counsel:
NELSON G. ROSS,
DAVID M. MANDEL,
ROPES & GRAY,
225 Franklin Street,
Boston, Massachusetts 02110.
(617) 423-6100

W. REYNOLDS ALLEN,
HOGG, ALLEN, RYCE,
NORTON & BLUE, P.A.,
609 West Horatio Street,
Tampa, Florida 33606.
(813) 251-1210

APPENDIX A.

Corporate Affiliates of South Florida Beverage Corporation

ABC Advertising Corporation
Airway Drive-In Theatre Co., Inc.
Alpert's Warehouse Showrooms, Inc.
Barclay Leasing Corp.
Bedford Mall Cinema, Inc.
Beta One Leasing, Inc.
Cinema AD-Ventures, Inc.
College Square Cinema, Inc.
Coral Television Corporation
Dazzle, Inc.
Dedham Cinema, Inc.
Des Moines Drive-In Theatre Company
Fram-Gard Theatre Corp. of Del.
France Drive-In Corp.
GCC Beverages, Inc.
GCC Beverages of Mass., Inc.
GCC Broadcasting Corp.
GCC-Capricorn I, Inc.
GCC Communications of Boston, Inc.
GCC Communications, Inc.
GCC-Cross of Iron, Inc.
GCC Films, Inc.
GCC-Hanover Street, Inc.
GCC-The Silver Bears, Inc.
GCC Theatres, Inc.
G.C. Theatre Corp. of California
General Cinema Corp. of Arizona, Inc.
General Cinema of Arkansas
General Cinema of California, Inc.

General Cinema Corp. of Connecticut
General Cinema of Florida, Inc.
General Cinema Corp. of Georgia
General Cinema Corp. of Indiana
General Cinema Corp. of Iowa
General Cinema Corp. of Kansas
General Cinema Corp. of Kentucky
General Cinema Corp. of Louisiana
General Cinema Corp. of Maine
General Cinema Corp. of Maryland, Inc.
General Cinema Corp. of Massachusetts
General Cinema Corp. of Michigan
General Cinema Corp. of Minnesota, Inc.
General Cinema Corp. of Mississippi
General Cinema Corp. of Missouri
General Cinema Corp. of Nevada
General Cinema of New Mexico, Inc.
General Cinema Corp. of New York, Inc.
General Cinema Corp. of North Carolina
General Cinema Corp. of Oklahoma, Inc.
General Cinema Corp. of Pennsylvania
General Cinema Corp. of Rhode Island
General Cinema Corp. of South Carolina
General Cinema Corp. of Tennessee
General Cinema Corp. of Texas
General Cinema Corp. of Virginia
General Cinema Corp. of Washington
General Cinema Corp. of Washington, D.C.
General Cinema Corp. of West Virginia
General Cinema Corp. of Wisconsin
Ginger General Joint Venture
Hackensack General Theatre Corp.
Hanover Mall Cinema, Inc.
Hanover Street Productions, Limited

Harundale Cinema, Inc.
Harundale Operating Corp.
Jefferson Square Joint Venture
Jersey Division Realty Corp.
Jersey Second Division Corp.
Joliet Cinema, Inc.
Kokomo Cinema, Inc.
Laconia Theatre Corp.
Lincoln Realty Corporation
London Square Cinema, Inc.
Louis Joliet Cinema, Inc.
Louis Joliet Joint Venture
Madison Cinema, Inc.
Meyerland Cinema, Inc.
Meyerland Leasing Corp.
Midway Drive-In Theatre Co.
Midwest Theatres Corporation
Morris Plains General Theatre Corp.
Nashua Mall Cinema, Inc.
Natick Auto Theatre Corporation
NEMLC Beta Associates
Newport Plaza Cinema, Inc.
Omaha Drive-In Theatre Company
Pepsi-Cola Bottlers of Akron, Inc.
Pepsi-Cola Bottlers of Youngstown, Inc.
Polk Realty Corporation
Route 42 Cinema, Inc.
Shoregate Cinema, Inc.
Southtown Cinema Corp.
Sunkist Soft Drinks, Inc.
Timonium Concessions, Inc.
Timonium Drive-In Theatre Corp.
Timonium Realty Corp.
Totowa General Corp.

Troy Hills General Theatre Corp.
Union General Theatre Corp.
Westgate Brockton Cinema, Inc.
Westgate Cinema, Inc.
Westgate Leasing Corp.
Westwood Triplex Cinema, Inc.

Office - Supreme Court, U.S.
FILED
SEP 18 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2366

Supreme Court of the United States

October Term, 1981

EFRAIN FIGUEREDO, et al.,
Petitioners,

vs.

SOUTH FLORIDA BEVERAGE CORPORATION,
Respondent.

PETITION FOR CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

PETITIONERS' REPLY BRIEF

RICHARD KANNER
(*Counsel of Record*)
777 Brickell Avenue
Miami, Florida 33131
Attorney for Petitioners

R. L. MIDKIFF, INC., 906 Cherry Street, Kansas City, Mo. 64106, (816) 421-0090

No. 81-2366

Supreme Court of the United States

October Term, 1981

EFRAIN FIGUEREDO, et al.,
Petitioners,

vs.

SOUTH FLORIDA BEVERAGE CORPORATION,
Respondent.

PETITION FOR CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

PETITIONERS' REPLY BRIEF

FLUCTUATING HOURS AND DAILY WAGE DISPROVED AT TRIAL

The district court is not bashful in declaring its opinion conflicts with every known opinion on the "actual facts" issue (409 So.2d at 495, App. 20).

It is true that the "actual facts" test was applied in Aaron, as in most, if not all, other instances to in-

> crease the return to employees above the amount due under what was designated as the "regular rate" in the contract. We are unwilling to believe, however, that the doctrine is not a neutral principle which must be applied even though, as here, it may have the opposite effect.

The "actual facts test" is not a neutral principle because the realities of the unskilled labor market with its potential for abuse to workers, even union represented workers, prompts the "explicit agreement" requirement of the regulations and the cases. The "actual facts" found by the district court, based on union acquiescence and employee ignorance of their rights,[1] contradicts settled law that waiver is not a defense to the Act's national purpose and the public right, sought here to be enforced. The employer can protect himself with an explicit agreement and compliance thereto, but Pepsi admitted at trial that no agreement existed for a daily wage (Comptroller's testimony App. 40) and, therefore, could not meet this burden.

The actual facts in this case are that during the three years in question, so closely did Pepsi control the workers' schedule that Pepsi's expert witness, after examining all the plaintiffs' payroll records (R. 359), could present evidence (plaintiffs' Ex. C and P, R. 561 and 577 attached as appendix hereto) showing Pepsi paid these sixty-three plaintiffs for only 131.08 hours not actually worked. Based on an average salary of $275, this constitutes less than 5¢ per plaintiff per week. For this largess the district court accepted the daily wage and fluctuating workday argument.

---

1. Pepsi did not display a poster required by 29 CFR 5164, advising plaintiffs of their overtime pay rights (R. 23) nor, by agreement, did Pepsi keep time records for Saturday work required by 29 CFR §516.2 (R. 233).

Pepsi has yet to offer an explanation how their payment of "overtime" for less than forty hours is consistent with their claim of paying a daily wage. Nor does Pepsi deny that plaintiffs who work five days ordinarily work longer than forty hours.

Respectfully submitted,

RICHARD KANNER
777 Brickell Avenue
Miami, Florida 33131
Attorney for Plaintiffs

3/11/77	5	37.91		220.00	220.00	Abosaid, M.
3/18/77	5	31.97		220.00	220.00	Abosaid, M.
3/25/77	5	37.89		220.00	220.00	Abosaid, M.
4/1/77	5	36.56		220.00	220.00	Abosaid, M.
4/8/77	5	39.08		220.00	220.00	Abosaid, M.
4/15/77	5	38.96		230.00	230.00	Abosaid, M.
4/6/77	5	39.46		268.00	268.00	Almeida, G.
3/3/76	5	36.46		268.00	268.00	Almeida, G.
4/10/76	5	38.33		268.00	268.00	Almeida, G.
2/5/77	5	39.08		278.00	278.00	Almeida, G.
1/15/77	5	38.68		220.00	220.00	Nuno, A.
1/29/77	5	36.59		220.00	220.00	Nuno, A.
2/10/77	5	33.85		220.00	220.00	Nuno, A.
2/22/77	5	36.83		220.00	220.00	Nuno, A.
3/9/77	5	36.80		230.00	230.00	Nuno, A.
1/18/77	5	34.98		264.00	264.00	Riestra, L.
1/22/77	5	33.49		264.00	264.00	Riestra, L.
1/29/77	5	36.29		264.00	264.00	Riestra, L.
2/6/77	5	37.31		264.00	264.00	Riestra, L.
2/27/77	5	38.68		264.00	264.00	Riestra, L.
3/1/77	5	36.84		264.00	264.00	Riestra, L.

562

5/20/77	4	30.98		220.00	-44.00	176.00	Abosaid, M.
6/3/77	4	31.07		268.00		268.00	Almeida, G.
7/8/77	4	29.00		268.00		268.00	Almeida, G.
11/25/77	4	31.82		278.00		278.00	Almeida, G.
11/10/76	4	31.38		220.00	-44.00	176.00	Nuno, A.
2/4/77	4	27.34		220.00	-44.00	176.00	Nuno, A.
5/20/77	4	27.78		220.00	-44.00	176.00	Nuno, A.
3/11/77	4	23.20		264.00	-52.80	211.20	Reistra, L.
1/29/77	4	31.75		230.00	-46.00	184.00	Naranjo

4/8/77	3	22.89		268.00	-107.20	160.80	Almeida, G.
2/24/78	3	23.40		230.00	-92.00	138.00	Nuno, A.
1/22/77	3	22.88		220.00	-88.00	132.00	Romano, N.

564

2/25/72	2	15.93		220.00	-132.00	88.00	Nuno, A.

12/1/78	S	37.69	303.00	40		303.00		303.00	Almeida G.
12/3/78	S	37.59	303.00	40		303.00		303.00	Almeida G.
12/7/78	S	38.95	303.00	40		303.00		303.00	Almeida G.
1/1/79	S	38.72	240.00	40		240.00		240.00	Brinson C.
12/26/78	S	38.25	240.00	40		240.00		240.00	Hernandez E.
12/1/78	S	38.39	278.00	40		278.00		278.00	Lopez O.
12/21/78	S	38.70	278.00	40		278.00		278.00	Lopez O.
12/1/78	S	38.11	278.00	40		278.00		278.00	Lopez O.
12/4/78	S	37.92	278.00	40		278.00		278.00	Lopez O
12/15/78	S	37.12	240.00	40		240.00		240.00	Ortega O
12/28/78	S	38.98	278.00	40		278.00		278.00	Riestra L.
1/4/78	S	36.42	240.00	40		240.00		240.00	Romano N.
12/1/78	S	38.88	303.00	40		303.00		303.00	Armenteros
1/4/78	S	37.08	240.00	40		240.00		240.00	Navarro, R.
12/21/78	S	36.98	303.00	40		303.00		303.00	Riestra
12/78	S	36.73	303.00	40		303.00		303.00	Riestra
12/3/79	S	36.22	303.00	40		303.00		303.00	Riestra, L.

29.99

DFT

Filed EX. [illegible]
A.D. 19
Case No

B-25

578

			PAID								
/6/78	4	3146	240.00	32		8.00	192.00		48.00		240.00	Ortega, O
/16/78	4	3125	240.00	32			192.00				192.00	Ortega O.
25/78	4	3022	240.00	32			192.00				192.00	Romano, N
/8/78	4	2768	240.00	32		8.00	192.00		48.00		240.00	Romano, N

5/9

			PHIL					
1/26/79	3	2233	303.00	24.00		181.80	181.80	Fernandez,
1/14/78	3	2293	230.00	24.00		138.00	138.00	Romano, N.

	TIMECARDS		OT					
	DATE	HRS.	HRS.	DOLS.	SALARY		GROSS	EMPLOYEE LAST
1	1/14/77	4	44.53	12.53	26.25	220.00	-44.00	202.25	Castro, C.
2	1/18/77	4	37.47	5.47	14.66	244.00	-48.80	209.86	Castro, C.
12	2/2/77	4	38.08	6.08	15.18	230.00	-46.00	199.18	Alvarez, A.
1	1/13/78	4	33.28	1.28	3.57	230.00	-46.00	187.57	Alvarez, A.
1	1/28/77	4	34.92	2.92	7.48	220.00	-44.00	183.48	Avila, P.
1	1/21/77	4	39.12	7.12	16.63	220.00	-44.00	192.63	Hernandez, L.
1	1/28/77	4	35.17	3.17	8.07	220.00	-44.00	184.07	Hernandez, L.
1	1/8/77	4	38.70	6.70	15.77	220.00	-44.00	191.77	Hernandez, L.
1	1/29/77	4	36.03	4.03	10.08	220.00	-44.00	186.08	Hernandez, L.
5	1/6/77	4	41.88	9.88	21.78	220.00	-44.00	197.78	Riqual, A.L.
1	1/23/77	4	37.00	5.00	12.79	230.00	-46.00	196.79	Riqual, A.L
1	1/6/78	4	35.82	3.82	10.03	230.00	-46.00	194.03	Riqual, A.L
3	1/3/76	3	25.69	1.69	4.47	220.00	-88.00	136.47	Avila, P.
1	1/1/77	3	27.99	3.99	9.99	220.00	-88.00	141.99	Hernandez, L.
1	1/22/77	2	17.41	1.41	3.74	220.00	-132.00	91.74	Hernandez, L.
1	1/18/77	2	23.89	7.89	22.91	278.00	-166.80	134.11	Marshall, L.J.